92-945

NO.

Supreme Court, U.S.
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1992

NORTHWEST AIRLINES, INC.,
Petitioner

v.

AMERICAN AIRLINES AND
AMR CORPORATION,
Respondents

**Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether mandamus jurisdiction is available to review a district court order denying a motion to disqualify counsel in a civil action in the absence of (1) a showing of a clear abuse of discretion or usurpation of judicial power, (2) a showing that the parties seeking mandamus lacked adequate alternative means to obtain the relief they seek, and (3) a showing that the right to issuance of the writ is clear and indisputable?

II. Whether a court of appeals may determine whether mandamus should issue by examining the disqualification issue, including underlying factual findings, de novo?

III. Whether the substantial-relationship standard for determining attorney disqualification in federal courts encompasses a duty of loyalty to former clients beyond the preservation of client confidences?

PARTIES

Petitioner is Northwest Airlines, Inc.[1] Petitioner is a plaintiff in the underlying antitrust litigation now pending in the United States District Court for the Southern District of Texas, Galveston Division, and was a respondent in the Fifth Circuit mandamus proceeding from which this petition for writ of certiorari arises.

Respondents are American Airlines, Inc. and AMR Corporation. Respondents are defendants in the underlying antitrust litigation now pending in the United States District Court for the Southern District of Texas, Galveston Division, and were the petitioners in the Fifth Circuit mandamus proceeding.

The Honorable Samuel B. Kent, Judge of the United States District Court for the Southern District of Texas, Galveston Division, is the Judge before whom the underlying antitrust litigation is now pending and was also a respondent in the Fifth Circuit mandamus proceeding pursuant to Rule 21 of the Federal Rules of Appellate Procedure, although his name was not listed as a respondent in the caption in that proceeding pursuant to Fifth Circuit Local Rule 21. Judge Kent was represented pro forma in the Fifth Circuit mandamus proceeding by counsel for the party

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[1] Northwest Airlines, Inc. is a wholly-owned subsidiary of NWA, Inc., which in turn is a wholly-owned subsidiary of Wings Holdings, Inc. Northwest Airlines, Inc. has no nonwholly-owned subsidiaries.

opposing the mandamus, Northwest Airlines, Inc., petitioner in this Court.

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**Petition For Writ Of Certiorari To
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PETITION FOR WRIT OF CERTIORARI

Petitioner Northwest Airlines, Inc. (Northwest) respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, dated September 4, 1992. The Fifth Circuit issued a writ of mandamus directing the United States District Court for the Southern District of Texas to vacate its order denying the motion filed by American Airlines, Inc. (American) to disqualify the law firm of Vinson & Elkins L.L.P. (Vinson & Elkins) from representing Northwest, and directing the district court to disqualify Vinson & Elkins from representing Northwest in this case on the ground that Vinson & Elkins's represen-

tation of Northwest in this case is substantially related to Vinson & Elkins's prior representation of American in certain concluded matters.

OPINIONS AND ORDERS DELIVERED BELOW

The opinion of the Fifth Circuit Court of Appeals granting the writ of mandamus is reported at 972 F.2d 605 (5th Cir. 1992), and is reprinted as Appendix A hereto.

The order of the United States District Court for the Southern District of Texas denying American's motion to disqualify Vinson & Elkins from representing Northwest is not reported and is reprinted as Appendix B hereto.

The order of the Fifth Circuit Court of Appeals denying Northwest's suggestion for rehearing en banc is not reported and is reprinted as Appendix C hereto.

JURISDICTION OF THIS COURT

This petition for a writ of certiorari seeks review of the September 4, 1992 decision of the Fifth Circuit Court of Appeals, which granted a writ of mandamus directing the district court to disqualify Vinson & Elkins from representing Northwest in this case.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, petitioner Northwest filed a timely suggestion for rehearing en banc in the Fifth Circuit, which the Fifth Circuit denied on September 29, 1992. Petitioner did not file a petition for panel rehearing in the Fifth Circuit.

Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

All Writs Act, 28 U.S.C. § 1651(a) (1988):

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

This mandamus dispute arises out of an antitrust action brought by Northwest against American on June 12, 1992, in the United States District Court for the Southern District of Texas. That court's jurisdiction was invoked under 28 U.S.C. § 1337 (1988). The district court consolidated this action with a suit brought a few days earlier by Continental Airlines against American.[1]

On July 1, 1992, American filed a motion to disqualify Vinson & Elkins from representing Northwest on the grounds that (1) Vinson & Elkins had already accepted representation of American in the previously filed Continental action, and (2) Vinson & Elkins's former representation of American in certain concluded matters disqualified Vinson & Elkins from representing Northwest in this lawsuit. Northwest moved to disqualify Weil, Gotshal & Manges because of its possession of confidential information from a prior representation. No party requested a hearing. The case was before the trial court on voluminous affidavits and appended documents creating sharply disputed factual issues. On July 24, 1992, the district court, after exhaustive review, denied both American's motion to disqualify

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[1] Continental Airlines was not a party to the Fifth Circuit mandamus proceeding.

Vinson & Elkins and Northwest's motion to disqualify Weil, Gotshal & Manges and issued a succinct written opinion with broad fact findings. App. B at B-1 to B-6. In ruling on these motions, the district court applied the traditional substantial-relationship test required by well-settled Fifth Circuit and Texas authority. *Id.* at B-2 to B-3, B-4 n.2. No party asked for further findings of fact. American then filed its petition for writ of mandamus in the United States Court of Appeals for the Fifth Circuit, invoking that court's jurisdiction under 28 U.S.C. § 1651 (1988).

On September 4, 1992, the Fifth Circuit held that the district court erred in denying American's motion to disqualify Vinson & Elkins. App. A at A-1. The Fifth Circuit issued a writ of mandamus directing the district court to vacate its order denying American's motion and to enter an order disqualifying Vinson & Elkins from representing Northwest. *Id.* at A-56. With respect to American's claim that Vinson & Elkins had already agreed to represent American in the Continental suit, the Fifth Circuit recognized the factual controversy on "switching sides" but found remand for further findings of fact on this point unnecessary because it held that Vinson & Elkins should be disqualified on other grounds. *Id.* at A-13 to A-18. In overturning the trial court's finding that Vinson & Elkins's representation of Northwest was not substantially related to its prior representation of American, the Fifth Circuit made de novo fact findings and created a new duty of loyalty to former clients. *Id.* at A-37 to A-56.

Since the Fifth Circuit's ruling, the litigation has proceeded in the district court, and Vinson & Elkins has taken no part in the case. Should this Court grant certiorari and reverse the Fifth Circuit,

Northwest would have the option of having Vinson & Elkins represent it again in this lawsuit.

REASONS FOR GRANTING THE WRIT

Unless this Court exercises its certiorari jurisdiction to reverse the Fifth Circuit, this decision will distort two important bodies of law: the rules on mandamus jurisdiction and the substantive standards applicable to former-client conflict cases in federal courts. The Fifth Circuit's review of this disqualification case on mandamus expands the availability of mandamus jurisdiction far beyond the limits established by this Court. The decision ignores the absence of factors justifying the exercise of mandamus jurisdiction and eliminates any principled basis for limiting piecemeal appellate review of trial court disqualification orders. The same exigencies of judicial administration that led this Court to eliminate the availability of immediate appeals of disqualification orders through the use of the *Cohen* "collateral order" exception to the final judgment rule justify this Court's exercise of its certiorari jurisdiction in this case to limit the use of mandamus jurisdiction in attorney-disqualification cases.

Moreover, the standard of review applied by the Fifth Circuit in this case conflicts with the established standard of review in mandamus jurisdiction. The standard for issuance of mandamus laid down by this Court, followed by decisions in other circuits and previously followed in the Fifth Circuit, requires a clear abuse of discretion or a usurpation of judicial power. In conducting its mandamus review, the Fifth Circuit accorded no deference to the findings of the district court but instead engaged in an extensive and unprecedented de novo review of the facts. Indeed, the panel

engaged in a broader fact finding than would have been proper if the case had been before the court on direct appeal.

Finally, the Fifth Circuit's decision creates a new test for attorney disqualification to be applied in federal courts: a "duty of loyalty" to former clients entirely unrelated to the protection of client confidences. This is an ambiguous and unworkable standard that conflicts with decisions in other circuits and that rejects established norms in former-client conflicts analysis. The ethical standard governing attorneys in federal proceedings is a matter of federal law. The standard to be applied by federal courts in determining former-client conflicts is an important question that has not been, but should be, addressed by this Court. The Fifth Circuit's decision in this case will create great uncertainty about attorney disqualification, unduly narrow the freedom of clients to hire lawyers of their choice, encourage the use of disqualification motions as a tactical device, and allow multibillion dollar corporations to conflict out law firms from representing an adverse party in future litigation by periodically doling out relatively small amounts of work to these firms.

Unless reversed by this Court, the Fifth Circuit's decision will open the floodgates to piecemeal appellate review of nonappealable trial-court disqualification orders, authorize appellate courts to make de novo fact findings while ignoring district courts' discretion in ruling on disqualification motions, and serve to deprive a party of its chosen counsel in litigation. Those serious consequences are compelling reasons for this Court to exercise its certiorari jurisdiction.

I. In Conflict With Decisions Of This Court And Other Circuits, The Fifth Circuit's Exercise Of Mandamus Jurisdiction In This Case Expands The Availability Of Mandamus Review Of Attorney-Disqualification Motions.

In *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), this Court held that district-court orders denying a motion to disqualify are not immediately appealable as a collateral order under 28 U.S.C. § 1291:

> The propriety of the district court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is normally only after final judgment. The decision whether to disqualify an attorney ordinarily turns on the particular factual situation of the case then at hand, and the order embodying such a decision will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits. . . . [S]hould the Court of Appeals conclude after the trial has ended that permitting continuing representation was prejudicial error, it would retain its usual authority to vacate the judgment appealed from and order a new trial. That remedy seems plainly adequate should petitioner's concerns of possible injury prove ultimately well founded.

Id. at 377-78. *Firestone* left open the possibility that review of a trial court order denying a disqualification motion might be available pursuant to 28 U.S.C. § 1292(b) or through the writ of mandamus if the party seeking review could demonstrate that it would be irreparably injured if forced to await final judgment. *Id.* at 378 n.13; *see also Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 435 (1985) (leaving open the same question in the context of a trial court order *granting* a disqualification motion). This Court cautioned, however, that

mandamus review of disqualification orders would be available, if at all, only "in the exceptional circumstances for which [the writ of mandamus] was designed." *Firestone*, 449 U.S. at 378 n.13; *see also Richardson-Merrell*, 472 U.S. at 435. Because the petitioner in *Firestone* "made no colorable claim that the harm it might suffer if forced to await the final outcome of the litigation before appealing the denial of its disqualification motion is any greater than the harm suffered by any litigant forced to wait until the termination of trial before challenging interlocutory orders it considers erroneous," this Court did not reach the issue of whether and to what extent a § 1292(b) appeal or the extraordinary remedy of mandamus might be available to challenge disqualification motions before final judgment. *Firestone*, 449 U.S. at 378 n.13.

The standards to be employed in determining whether mandamus review is available are well settled. "[T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980) (per curiam). Mandamus proceedings are not a substitute for appeal. *See Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). This Court has recognized that the writ of mandamus has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Mallard v. United States Dist. Court*, 490 U.S. 296, 308 (1989); *Daiflon*, 449 U.S. at 34. To ensure that mandamus remains an extraordinary remedy, petitioners must demonstrate that they lack adequate alternative means to obtain the relief they seek, and carry the burden of showing that their right to

issuance of the writ is clear and indisputable. *Mallard*, 490 U.S. at 309.

Despite the Fifth Circuit's allusion to the limited availability of mandamus review, App. A at A-4 to A-7, its opinion effectively ignores the demanding procedural requirements for mandamus set by this Court. First, the court concluded, without any analysis, that American has no adequate alternative means to obtain the relief sought on the grounds that "the nature and size of this litigation would *seem* to preclude effective review upon final judgment." *Id.* at A-6 (emphasis added). This rationale provides no basis for granting mandamus, because it does not demonstrate how the harm American would suffer from awaiting final judgment would be greater than that of any other litigant forced to await final judgment before challenging an interlocutory order. *See Firestone*, 449 U.S. at 378-79 and n.13. Indeed, according to the Fifth Circuit's rationale, mandamus review of virtually all interlocutory rulings in this case and in other cases of similar "nature and size" would be justified.

Second, the Fifth Circuit justified mandamus on the ground that this case raised important questions pertaining to the proper interpretation and application of ethical standards in disqualification cases. App. A at A-6. This Court has indicated that mandamus may be warranted when a case presents an important and novel issue of first impression, and the standards for mandamus are otherwise met. *Schlagenhauf*, 379 U.S. at 110-11; *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257 (1956). But this case presented no novel issues of first impression; rather, the district court simply examined the disputed facts and made its determination using well-settled Fifth Circuit precedents. App. B at B-4 n.2. The Fifth Circuit's grant of mandamus

in this case extends the limits of mandamus jurisdiction established by this Court and conflicts with decisions in other circuits. *See, e.g., In re Bushkin Assocs.*, 864 F.2d 241, 247 (1st Cir. 1989) (denying a petition for mandamus review of an order granting disqualification because, *inter alia*, the case did not present a novel legal question); *Merle Norman Cosmetics, Inc. v. United States Dist. Court*, 856 F.2d 98, 101 (9th Cir. 1988) (denying a petition for mandamus to review the denial of a disqualification motion because, *inter alia*, "[t]he substantial relationship issue is not a novel one in this circuit," and thus the issue raised was not a new or important one). As this Court has recognized, "If we applied the reasoning advanced by the [Fifth Circuit], then every interlocutory order which is wrong might be reviewed under the All Writs Act." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382-83 (1953).[2]

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[2] In support of its position, the Fifth Circuit relied on its recent opinion in *In re Dresser Indus., Inc*, 972 F.2d 540 (5th Cir. 1992). App. A at A-4 to A-6. *Dresser* provides no basis for granting mandamus in this case. Because *Dresser* involved novel issues and undisputed facts, the court of appeals could easily determine if the party seeking mandamus had a clear and indisputable right to the relief sought. *Compare Dresser*, 972 F.2d at 543 (issuing mandamus to review a district court disqualification ruling made on undisputed facts) *with In re Mechem*, 880 F.2d 872, 873-75 (6th Cir. 1989) (observing that mandamus is not an appropriate vehicle to review a district court's disqualification order when the order turned on the particular facts of the case) *and Daiflon*, 449 U.S. at 35-36 (noting that when a matter is committed to the district court's discretion, it cannot be said that a litigant's right to a particular result is clear and indisputable). In this case, the facts were sharply disputed, and the district court neither addressed nor pronounced any new rules of law. In short, the Fifth Circuit's opinion in *Dresser* provides no support for the proposition that this attorney-disqualification case falls within the narrow class of exceptional cases warranting the exercise of mandamus jurisdiction.

In *Firestone*, *Richardson-Merrell*, and *Flanagan*,[3] this Court established beyond doubt that interlocutory review of orders on attorney-disqualification motions is almost never appropriate. As this Court has recognized, "the *district judge* has primary responsibility to police the prejudgment tactics of litigants, and [ ] the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings." *Richardson-Merrell*, 472 U.S. at 436 (emphasis in original). Moreover, the clear import of the Court's teaching on mandamus is that its use must be confined to the "extraordinary circumstances" for which the writ was designed. In this case, those "extraordinary circumstances" simply do not exist, and the Fifth Circuit made no attempt to demonstrate them, beyond invoking (without further elaboration) the "nature and size" of the litigation. App. A at A-6. By granting mandamus in this case, the Fifth Circuit undercut *Firestone*, *Richardson-Merrell*, and *Flanagan*, and opened the door to interlocutory review of orders on attorney-disqualification motions virtually on demand. Indeed, if mandamus is appropriate in this case, it is difficult to see why it would not be appropriate in any case in which a district court has granted or denied a disqualification motion.

Since this Court's decision in *Firestone*, the Fifth Circuit is the only circuit that has granted mandamus and reversed a district court's denial of a disqualification motion. Although the Eighth and Ninth Circuits have also addressed the availability of mandamus to review

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[3] *Flanagan v. United States*, 465 U.S. 259, 269 (1984) (holding that district court orders granting a motion to disqualify counsel in criminal cases are not collateral orders immediately appealable under 28 U.S.C. § 1291).

trial court orders denying disqualification of counsel, neither circuit has granted the writ.[4] *See Lunde v. Helms*, 898 F.2d 1343 (8th Cir.), *cert. denied*, 111 S. Ct. 249 (1990); *Merle Norman Cosmetics, Inc. v. United States Dist. Court*, 856 F.2d 98 (9th Cir. 1988); *In re Ford Motor Co.*, 751 F.2d 274 (8th Cir. 1984); *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339 (9th Cir. 1981).

In *Ford Motor*, the Eighth Circuit observed that the "[d]enial of a motion to disqualify will rarely justify the issuance of a writ of mandamus," and refused to issue the writ, holding that the petitioner had an adequate alternative remedy by appeal after final judgment. 751 F.2d at 275-76. In *Lunde*, the Eighth Circuit treated an appeal of a disqualification order as a petition for mandamus and summarily denied the petition on the grounds that there were no "extraordinary circumstances" justifying the writ. 898 F.2d at 1345.

The Ninth Circuit, in *Merle Norman Cosmetics*, denied the petition for mandamus to review the denial of a motion to disqualify because, *inter alia*, "the substantial relationship issue is not a novel one in this circuit," and the district court did not clearly err as a matter of law. 856 F.2d at 100-02. In *Jelco*, the Ninth Circuit treated an appeal as a petition for mandamus and upheld the trial court's denial of disqualification, finding that the court had not abused its discretion. 646 F.2d at 1351.

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[4] In *C.P.C. Partnership v. Nosco Plastics, Inc.*, 719 F.2d 400 (Fed. Cir. 1983), involving an appeal from an order refusing to disqualify counsel, the Federal Circuit concluded it had no general authority to issue a writ of mandamus and that 28 U.S.C. § 1651 provided no basis to issue the writ in that case. *Id.* at 401.

While clearly wrong, the decision of the Fifth Circuit in this case is symptomatic of the increasingly confused and internally contradictory decisions in other circuits on the standard that should be employed to determine the availability of mandamus to review disqualification orders. For instance, in both *Jelco* and *Merle Norman*, the Ninth Circuit found the petitioner had met the requirement that it have no other adequate means of relief because a trial court order denying a motion to disqualify is no longer appealable under section 1291 or (in the Ninth Circuit) section 1292. *Merle Norman*, 856 F.2d at 101; *Jelco*, 646 F.2d at 1344. In so holding, the Ninth Circuit effectively ignored this Court's warning in *Firestone* that vacating the judgment and ordering a new trial would be a "plainly adequate" remedy in most cases. *Firestone*, 449 U.S. at 377-78.[5]

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[5] Subsequent to *Richardson-Merrell*, the First, Sixth, Ninth, and Tenth Circuits have addressed the related issue whether and to what extent mandamus is available to review a trial court order *granting* a disqualification motion. *See In re Bushkin Assocs.*, 864 F.2d 241 (1st Cir. 1989); *In re Mechem*, 880 F.2d 872 (6th Cir. 1989); *Christensen v. United States Dist. Court*, 844 F.2d 694 (9th Cir. 1988); *In re American Cable Publications, Inc.*, 768 F.2d 1194 (10th Cir. 1985); *American Protection Ins. Co. v. MGM Grand Hotel-Las Vegas, Inc.*, 765 F.2d 925 (9th Cir. 1985). The courts in these cases have reached conflicting results, and the reasoning underlying the decisions has varied widely. The First Circuit, while refusing to grant the writ on the facts before it, left open the possibility that mandamus may be available under exceptional circumstances. *Bushkin*, 864 F.2d at 247. In *Mechem*, on the other hand, the Sixth Circuit denied the writ and indicated that mandamus is almost never an appropriate vehicle for reviewing trial court disqualification orders. 880 F.2d at 874. The Ninth Circuit in *Christensen* issued the writ of mandamus, finding that there was no adequate alternative remedy, but summarily denied the writ in *MGM*, citing the lack of "extraordinary circumstances." *Christensen*, 844 F.2d at 697; *MGM*, 765 F.2d at 926. In *American Cable*, the Tenth Circuit issued the writ of mandamus in a case involving undisputed facts. 768 F.2d at 1195.

Firestone laid down a bright-line rule: indeed since then any attempt to take an immediate appeal from denial of disqualification is so clearly unfounded that it invites the imposition of sanctions. *Collins v. Amoco Prod. Co.*, 706 F.2d 1114 (11th Cir. 1983). That rule was the product of experience.

> The arguments that significant and irreparable harm can be caused by an erroneous denial of disqualification are forceful. They were overcome in the courts of appeals by actual experience. Experience showed that motions to disqualify were misused as a dilatory tactic, and that the delay imposed by immediate appeal was frequently costly. Although the courts tended to say it obliquely, they also seemed to feel that the prospect of significant prejudice is remote. District courts are not apt to be often wrong in denying motions to disqualify, and such mistakes as occur are not likely to lead to significant changes in the trial process. Even the appearance of impropriety is diluted by the judge's determination that no impropriety is involved.

15B CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 3914.21, at 94 (2d ed. 1992). The costs that this Court sought to eliminate by its ruling in *Firestone* are no less great when appellate review is sought under the name of mandamus rather than appeal.

The Fifth Circuit's decision to review this case on mandamus, despite the absence of any extraordinary circumstances justifying the exercise of mandamus jurisdiction, conflicts with *Firestone* and with other decisions of this Court limiting mandamus jurisdiction, as well as with the decisions of the Eighth and Ninth Circuits concluding that mandamus does not lie in cases like this one. It invites an application for mandamus whenever a motion to disqualify counsel is denied. In

practical effect, this would wipe out *Firestone* and impose again on the courts of appeals and on litigants the burdens the *Firestone* rule was intended to avoid. This Court should exercise its certiorari jurisdiction to reaffirm *Firestone* and to limit the use of mandamus review in disqualification matters to those cases that present the truly exceptional circumstances for which the writ is intended.

II. In Conflict With Decisions Of This Court, Of Other Circuits, And Of Other Panels Of Its Own Circuit, The Fifth Circuit Improperly Engaged In A De Novo Review Of The Factual Findings Of The District Court.

As this Court has made clear, mandamus will issue only for a clear abuse of discretion or conduct amounting to a usurpation of judicial power. *Daiflon*, 449 U.S. at 35; *Mallard*, 490 U.S. at 309. Moreover, this Court has indicated that where a matter is committed to the trial court's discretion, it cannot be said that a litigant's right to a particular result is clear and undisputable. *Daiflon*, 449 U.S. at 36.

In this case, the Fifth Circuit recognized the inherent difficulty in granting mandamus when the issue in dispute is committed to the discretion of the district court. But the court sidestepped this problem by rejecting the widely accepted rule that attorney disqualification is committed to the sound discretion of the trial court. App. A at A-7. Although the Fifth Circuit stated it would review the district court's "reading" of the relevant ethical standard de novo, App. A at A-7, it in fact treated the substantial-relationship issue as a question of law that it could decide de novo. In so doing, the Fifth Circuit embarked on an unprecedented and insupportable de novo review of facts that were highly disputed in the district court. App. A at A-37 to A-56.

The Fifth Circuit's position that the trial court has no discretion in attorney-disqualification motions conflicts with the First, Second, Third, Seventh, Eighth, and Ninth Circuits, all of which have held that a ruling on attorney disqualification is committed to the sound discretion of the district court. *See, e.g., Kevlik v. Goldstein*, 724 F.2d 844 (1st Cir. 1984); *Grahams Serv. Inc. v. Teamsters Local 975*, 700 F.2d 420 (8th Cir. 1982); *English v. Local Union No. 46*, 654 F.2d 473 (7th Cir. 1981); *Kreda v. Rush*, 550 F.2d 888 (3d Cir. 1977); *Gas-A-Tron v. Union Oil Co.*, 534 F.2d 1322 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976); *W.T. Grant Co. v. Haines*, 531 F.2d 671 (2d Cir. 1976). Even in the Fifth Circuit, the "abuse of discretion" standard of review for trial-court attorney-disqualification orders has been recognized and applied. *See Johnston v. Harris County Flood Control District*, 869 F.2d 1565, 1569-70 (5th Cir. 1989); *In re Gopman*, 531 F.2d 262, 266 (5th Cir. 1976). Only two weeks before the decision below came down another panel of the Fifth Circuit had said: "On appeal, the standard of review for the grant or denial of a motion to disqualify would be for abuse of discretion." *In re Dresser Indus., Inc.*, 972 F.2d 540, 542 n.4 (5th Cir. 1992).

Stricter appellate scrutiny is applied when the facts are undisputed. "In disqualification cases such as this, where the facts are not in dispute, District Courts enjoy no particular functional advantage over appellate courts in their formulation and application of ethical norms." *Woods v. Covington Country Bank*, 537 F.2d 804, 810 (5th Cir. 1976); *Dresser*, 972 F.2d at 543. But that is not this case. Here the

facts were disputed in numerous conflicting affidavits.[6] The factual issues the trial court reviewed in ruling on the disqualification motion -- including the scope of Vinson & Elkins's prior representation of American, the materials to which Vinson & Elkins had access, the documents it reviewed, even the subject matter of the prior lawsuits-- were all hotly contested by the parties. Thus, it is clear that there is no basis, even under Fifth Circuit precedent, for treating this attorney-disqualification case as a question of law.[7]

It is also clear that in the Fifth Circuit the determination whether two matters are substantially related for purposes of attorney disqualification is essentially factual. *See Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977); *Uniweld Prods., Inc. v. Union Carbide Corp.*, 385 F.2d 992, 995 (5th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968); *see also Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1029 (5th Cir. Unit B) ("careful comparison" of present and prior representations required), *cert. denied*, 454 U.S. 895 (1981). Here, although the Fifth Circuit purported to review the district court's findings of fact for clear error and its "reading" of the relevant ethical standards de novo, it in fact engaged in a de novo review of the district court's application of the ethical standards to disputed facts, substituting its own fact findings

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[6] The trial court noted in its order that "the filings, *on the disqualification issue alone*, form a stack approximately 45 inches high and weighing 117 pounds." App. B at B-5 (emphasis in original).

[7] The panel opinion indicates that Northwest "conceded" that abuse of discretion was not the appropriate standard of review. App. A at A-7. To the contrary, Northwest's brief in the Fifth Circuit clearly states its position that mandamus is appropriate only where there is a clear abuse of discretion or usurpation of power by the trial court.

for those of the district court. *See* App. A at A-37 to A-56. Although the district court's findings were not detailed, the court specifically noted in its opinion that it had "carefully examined the dumbfoundingly voluminous pleadings on file" in making these findings. App. B at B-2. In determining the ultimate fact that this lawsuit was not substantially related to the prior matters in which Vinson & Elkins had represented American, the district court necessarily resolved the factual disputes on each of American's grounds for disqualification in favor of Northwest. Nevertheless, the Fifth Circuit, in reviewing the record below, adopted much of American's version of the facts and resolved the ultimate factual issues in favor of American, in direct contradiction to the findings of the district court. Thus, although the district court found, *inter alia*, that

> (1) "there is some evidence that Vinson & Elkins has represented [American] in regard (sic) other, unrelated matters";
>
> (2) "the matters that [Vinson & Elkins] did handle for [American] were only tangentially related to this litigation"; and
>
> (3) "any information actually received by Vinson & Elkins was not sufficient to cause any material prejudice to [American] in this litigation," App. B at B-2, B-3;

the Fifth Circuit instead found, *inter alia*, that:

> (1) two prior Texas cases "involved two particular matters at issue in the present case," App. A at A-39;
>
> (2) "[Vinson & Elkins's] representation of American in the Fort Bend case is substantially related to the present case," App. A at A-43; and

> (3) "given that the two cases sharing this 'subject matter' allege similar antitrust violations, we find [Vinson & Elkins's] representation of American in System One substantially related to its present representation of Northwest," App. A at A-48.

Nowhere in its opinion does the Fifth Circuit state that any fact found by the district court was "clearly erroneous."

In reviewing the disqualification issue de novo, rather than for abuse of discretion, the Fifth Circuit ignored precedent from this Court holding that de novo review is inappropriate on mandamus. *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245 (1964) (reversing the Seventh Circuit in a criminal case on the grounds that in granting mandamus, the court "undertook a de novo review of the record and itself exercised the discretionary function which the [criminal venue] rule commits to the trial judge."). Indeed, the panel engaged in a broader fact finding than would have been proper if the case had been before it on direct appeal. Even on direct appeal, de novo review of the district court's factual findings is improper. Fed. R. Civ. P. 52(a); *see Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) (making clear that trial court factual determinations made on the basis of conflicting documentary evidence are entitled to the same deference by appellate courts as those made after testimony in open court). Moreover, as this Court has emphasized, even under the "clearly erroneous" standard of Rule 52(a), the court of appeals' review is deferential, and "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as a trier of fact, it would have

weighed the evidence differently." *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (quoting *Anderson v. City of Bessemer City*).

The Fifth Circuit appears to base its de novo review of the facts on its conclusion that the district court did not make adequate fact findings. App. A at A-7.[8] Even if the Fifth Circuit found the district court's findings to be an inadequate basis for review on mandamus, engaging in de novo fact finding is still not justified. It is not the function of appellate courts to engage in primary fact finding. *Pullman-Standard, Div. of Pullman, Inc. v. Swint*, 456 U.S. 273, 291-93 (1982). Instead, the Fifth Circuit should have remanded the case to the district court to make fact findings that would have enabled it properly to review the district court's rulings. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (reversing the court of appeals because it had usurped the fact finding role of the trial court). As this Court explained in *Icicle Seafoods*:

> If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed

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[8] The district court stressed that it believed that the motions were filed for tactical reasons, and thus "although the Court has considered all the material offered and has engaged in substantial deliberations, it has taken the liberty of reducing its explanation to a more summary form." App. B at B-4 n.2. In view of the trial court's heavy docket, it is certainly not remarkable that it decided, in the absence of request or objection by any party, not to make detailed findings.

> the District Court's judgment. But it should not simply have made factual findings on its own.

Id. at 714. Indeed, remanding to the district court is precisely what the Fifth Circuit has done in other disqualification cases. *See, e.g., Duncan v. Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020, 1033 (5th Cir. Unit B) (remanding a disqualification case for the district court to make detailed findings of fact and correctly allocate the burden of proof), *cert. denied*, 454 U.S. 895 (1981); *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977) (vacating order denying disqualification and remanding for formal findings of fact and conclusions of law).

As other courts have recognized, mandamus is simply not the appropriate vehicle to review fact-intensive determinations by district courts such as the determinations of the district court in this case. *Compare In re Mechem*, 880 F.2d 872, 873-75 (6th Cir. 1989) (rejecting the use of mandamus as a means to challenge an order disqualifying counsel when the district court's order turned on the particular facts of the case) *with In re American Cable Publications, Inc.*, 768 F.2d 1194, 1195 (10th Cir. 1985) (mandamus appropriate because "[t]his is not the ordinary lawyer disqualification case in which the outcome turns on fact findings regarding the lawyer's conduct in the case").

> Disqualification is almost never cut-and-dried; rather, as the Court has recognized, the "decision whether to disqualify an attorney ordinarily turns on the peculiar factual situation of the case then at hand . . . ." *Risjord*, 449 U.S. at 377. Because the district judge is on the front lines, with the smoke of battle pungent in his nostrils, he must be given considerable latitude in matching a condign sanction to counsel's breach of obligation.

In re Bushkin Assocs., 864 F.2d 241, 246 (1st Cir. 1989).

By denying the district court's findings any deference, the Fifth Circuit provides further incentive and increased opportunity for litigants to seek mandamus review. Unless this Court grants certiorari to review the Fifth Circuit's opinion, lawyers and their clients will feel free to seek de novo review of disqualification rulings through the vehicle of mandamus, even though the rulings are based on disputed facts. This use of the writ of mandamus makes a nullity of this Court's requirement that mandamus review might be available to review a district court's ruling on a disqualification motion only "in the exceptional circumstances for which [the writ] was designed." *Firestone*, 449 U.S. at 378 n.13; *Richardson-Merrell*, 472 U.S. at 435.

III. The Fifth Circuit's Decision Creates A New And Unworkable Duty Of Loyalty To Former Clients As The Federal Standard For Disqualification In Former-Client Cases, In Conflict With Established Norms Governing Former-Client Conflicts In The Federal Courts.

The Fifth Circuit's decision makes clear that the ethical standards governing attorney-disqualification motions in federal courts are defined by federal law. App. A at A-9 to A-10; *see, e.g., In re Snyder*, 472 U.S. 634, 635 n.6 (1985); *In re Finkelstein*, 901 F.2d 1560, 1564 (11th Cir. 1990); *United States v. Miller*, 624 F.2d 1198, 1200 (3d Cir. 1980). The proper standard to be applied in attorney-disqualification cases in federal courts is an important question of federal law that has not been, but should be, addressed by this Court.

The Fifth Circuit has created a novel and dangerous basis for finding conflicts of interest in cases involving attorneys representing a party adverse to a former client: a duty of loyalty divorced from the concept of protection of client confidences. The Fifth Circuit's

approach to attorney disqualification in this context conflicts with the law of other circuits and disregards the entire evolution of disqualification law over the last four decades. This broad and amorphous disqualification standard will inevitably promote the tactical abuse of disqualification motions expressly disapproved by this Court while simultaneously usurping the role of the respective state and federal grievance bodies in disciplining the members of their bars.

For purposes of disqualification analysis, courts have long distinguished the representation of interests adverse to a *former* client from the representation of interests adverse to a *current* client. In the current-client context, the broad ethical prohibition has historically been grounded on a lawyer's duty of undivided loyalty to the current client. *See, e.g., Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976). *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.3.2 (1986). Thus, in the absence of client consent, a lawyer is precluded from representing interests adverse to a current client, even if there is no danger that the lawyer could use client confidences against the client in the case in which disqualification is sought. *Cinema 5*, 528 F.2d at 1386.

In the case of former clients, on the other hand, the scope of disqualification is narrower, and courts have inquired whether the current matter is substantially related to a matter in which the attorney represented the former client. *See T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953). Under this standard, the concern is whether there is a genuine threat that the challenged attorney might betray the confidences of the former client. *See Duncan v. Merrill Lynch*, 646 F.2d at 1028; *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 22, 38 (D.D.C. 1984) (also noting

that existence of substantial relationship is a question of fact).[9] The concept of loyalty is relevant to the analysis only in the sense that a lawyer has a qualified obligation to maintain the confidences of former as well as current clients.[10] This has been expressed recently in section 213 of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Tent. Draft No. 4, 1991). Section 213 focuses exclusively on confidentiality interests as a basis for disqualification and the substantial relationship test. Comment b to section 213 points out one of the dangers of overly broad former-client conflict law: "a rule that would transform each retainer into a lifetime commitment of *loyalty* would make lawyers reluctant to take new, relatively modest matters." *Id.* (emphasis added). That applies with particular force in specialties such as antitrust and in small communities with a

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[9] Indeed, the substantial-relationship test is both grounded upon and a reflection of concerns about the protection of former client confidences: the test permits the party seeking disqualification to establish the existence of a genuine threat that confidences might be disclosed by pointing to the relationship between the current and former matters, rather than by revealing those very confidences that movant seeks to protect. *See, e.g., Duncan*, 646 F.2d at 1032. Of course, a movant can alternatively support a motion to disqualify by offering proof that the challenged counsel actually possesses disqualifying confidential information. *Id.*

[10] Special situations, not germane to this case, exist in which a duty of loyalty (other than a duty to protect confidential client information) may remain relevant in former-client conflict analysis. Thus, a duty founded on loyalty may be relevant in situations in which a threat exists that a former client's trust in a former lawyer was exploited by the lawyer in later commercial dealings or in which the former client's representation was purposefully manipulated in order to gain advantage for a subsequent client. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.4.2(b) (1986). More broadly, the present client may require protection because of concern that the lawyer's sense of loyalty to the former client will distort the lawyer's representation of the present client. *See id.* at 362.

relatively limited number of lawyers. Reflecting sensitivity to such concerns, the evolution of the substantial-relationship test in the federal and state courts reflects judicial efforts to tighten and clarify the test, so as to avoid unnecessary disqualification of counsel based upon, for instance, a mere superficial resemblance between the current and former representation. *See, e.g., Duncan*, 646 F.2d at 1029; *Laker*, 103 F.R.D. at 40. The salience of confidentiality and the general irrelevance of loyalty is illustrated most obviously by the rule--accepted everywhere save in this one case--that a lawyer may file suit against a former client (as long as on a matter not substantially related to the former representation). *See, e.g.*, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS, § 7.4.1, at 358-59 (1986).

In its opinion, the Fifth Circuit detaches the concept of loyalty from the protection of client confidences and establishes it as coequal with the confidentiality basis of the substantial-relationship test. App. A at A-25 to A-32. In so doing, the Fifth Circuit has turned four decades of judicial learning on its head. The Fifth Circuit squarely rejected the approach taken in a long line of cases in the Second Circuit, holding that attorney-disqualification motions should not be granted unless the questioned behavior threatens to "taint" the underlying trial. App. A at A-10 to A-13; *see Armstrong v. McAlpin*, 625 F.2d 433, 445-46 (2d Cir. 1980), *vacated*, 449 U.S. 1106 (1981); *Board of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979); *W.T. Grant Co. v. Haines*, 531 F.2d 671, 677 (2d Cir. 1976). The approach of the Second Circuit, which has been widely followed by other

courts,[11] does not disregard or discount ethical concerns. Rather, it reflects the sound judicial recognition that disciplinary bodies, constituted solely to address allegations of attorney misconduct, are the appropriate bodies to deal with alleged attorney misconduct that does not threaten the fairness of adjudicatory proceedings, and that it would be both unnecessary and excessively harsh to deprive an innocent client of his or her chosen advocate when counsel's continued role will not threaten to unfairly taint the proceedings.[12]

One of the many merits of the substantial-relationship standard is that it permits a measure of predictability and certainty in detecting and assessing former-client conflicts because of the connections between former and subsequent representations. The new "disloyalty" rationale announced in this case is dangerous and

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[11] *See Fiandaca v. Cunningham*, 827 F.2d 825, 831 (1st Cir. 1987); *Koller v. Richardson-Merrell*, 737 F.2d 1038, 1055-56 (D.C. Cir. 1984), *vacated on other grounds*, 472 U.S. 424 (1985); *Ah Ju Steel Co., Ltd. v. Armco, Inc.*, 680 F.2d 751 (C.C.P.A. 1982); *Kitchen v. Arntech Chemical*, 769 F. Supp. 254, 258-59 (S.D. Ohio 1991); *Professional Servs. Indus. v. Kimbrell*, 758 F. Supp. 676, 680 (D. Kan. 1991); *University Patents, Inc. v. Kligman*, 737 F. Supp. 325, 329 (E.D. Pa. 1990); *In re Korea Shipping Co.*, 621 F. Supp. 164, 170 (D. Alaska 1985); *In re Asbestos Cases*, 514 F. Supp. 914, 922 (E.D. Va. 1981); *Meat Price Investigators v. Iowa Beef Processors, Inc.*, 448 F. Supp. 1, 3 (S.D. Iowa 1977), *aff'd*, 572 F.2d 163 (8th Cir. 1978). The Second Circuit approach has also been followed by several states. *See, e.g., Chambers v. Superior Court*, 175 Cal. Rptr. 575, 581 (Cal. Ct. App. 1981); *Reese v. Georgia Power Co.*, 381 S.E.2d 110, 112 (Ga. Ct. App. 1989). *See also Richardson-Merrell*, 472 U.S. at 441 (court need not "continue to permit an individual to be represented by an attorney who by his misconduct in open court has threatened the integrity of the proceedings.") (Brennan, J., concurring).

[12] The Fifth Circuit's statement that disqualification would be appropriate in this case even under the "taint" standard, App. A at A-33, is but another example of the panel's de novo fact finding.

inappropriate as a basis for disqualification in former-client cases because it is entirely unpredictable. It creates unnecessary and vast potential for expansion of disqualification motions (with corresponding de novo appellate review), while simultaneously injecting great uncertainty and unpredictability into disqualification law involving former clients.

There is no question that the rules governing lawyers in disciplinary matters should be enforced vigorously and fairly. But it is a great mistake to order disqualification when there is no legitimate threat to a former client's confidential information. Unlike disciplinary proceedings, in litigation the charges are leveled by an advocate for a private litigant who may be following an entirely private and perhaps peevish agenda, with no interest in the public-impact aspects of professional discipline. *Woods v. Covington County Bank*, 537 F.2d 804, 812-13, 819 (5th Cir. 1976). The Fifth Circuit's belief that "today there is less reason to suspect tactical motivations behind disqualification motions," App. A at A-12 is unwarranted. Indeed, the district court in this case expressly found that "*rarely has a court been presented with a more blatant example of the use of disqualification motions for tactical purposes.*" App. B at B-6. (emphasis in original). This Court itself has expressed its concern about the "tactical use of disqualification motions" to harass opposing counsel. *Richardson-Merrell*, 472 U.S. at 436. Delay, increased cost, and deprivation of an opponent's choice of counsel are, unfortunately, common goals of these motions. The Fifth Circuit's expansive approach to policing the legal profession greatly encourages these tactics. Combined with the Fifth Circuit's unprecedented standard for mandamus jurisdiction, tactical abuse of disqualification motions will certainly become more commonplace.

CONCLUSION

This Court should grant certiorari in this case to make clear that the *Firestone* rule applies when immediate review of orders on attorney-disqualification motions is sought by mandamus as well as by appeal, and limit the availability of mandamus jurisdiction in attorney-disqualification cases. The Fifth Circuit's decision encourages every party disappointed with a district court's disqualification ruling to interrupt the proceedings in the district court to seek mandamus review in the court of appeals. The Fifth Circuit's decision also authorizes appellate courts to make de novo factual findings, instead of reserving the issuance of the writ for cases in which the district court clearly and indisputably abused its discretion. The Fifth Circuit's newly-created federal duty of loyalty to former clients, not limited by the goal of protecting client confidences, is an unworkable and unsupported standard for determining attorney disqualification. The importance of these issues extends well beyond the facts of this dispute, for the outcome here extends the availability of mandamus jurisdiction, broadens the scope of review on mandamus, will deprive clients of their choice of counsel, and encourages former clients to use disqualification motions as a tactical device. For these reasons, the Court should exercise its discretion to grant a writ of certiorari.

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1992

NORTHWEST AIRLINES, INC.,
Petitioner

v.

AMERICAN AIRLINES AND
AMR CORPORATION,
Respondents

**Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit**

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7493

IN RE: AMERICAN AIRLINES, INC.,
AMR CORPORATION,

Petitioners

Petition for Writ of Mandamus
to the United States District Court
for the Southern District of Texas

(September 4, 1992)

Before POLITZ, Chief Judge, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

American Airlines, Inc. petitions for a writ of mandamus directing the district court to disqualify its former counsel Vinson & Elkins from representing plaintiff Northwest Airlines, Inc. We hold that the district court erred in denying American's motion and issue the requested writ.

I

Continental Airlines filed a complaint against American in the United States District Court for the Southern District of Texas on June 8, 1992, charging American with attempted monopolization by predatory pricing in violation of the Sherman Act. American filed a declaratory judgment action against Continental and Northwest in the United States District Court for the Northern District of Illinois the following day. Three days later, Northwest sued American in the Southern District of Texas. The Continental and Northwest suits have been consolidated by order of the district court.

On June 9, 1992, the day after Continental filed its complaint, David Schwarte, American's in-house counsel, asked Alison Smith, a VE partner, if VE would represent American in this case. Smith accepted the American representation on June 10, unaware that four days earlier Harry Reasoner, another VE partner, had promised Joe Jamail, Northwest's counsel, that VE would not consider representing another airline until Jamail and Reasoner had discussed joining forces. When Smith informed Reasoner of her acceptance of the American representation, Reasoner directed her to inform Schwarte that "there might be a problem with Northwest" and that Reasoner would make the final decision the next day. On June 11 Reasoner accepted the Northwest representation.

American asserted that VE's prior representation of American and its agreement to do so in this case made its

representation of Northwest improper. It requested that VE withdraw from the case in letters sent on June 12 and June 19. Northwest refused and on July 1 American moved to disqualify VE. The parties at this time became aware that Weil, Gotshal & Manges, American's lead counsel, had previously represented Northwest and Continental. An exchange of "conflicts" was briefly considered. When American indicated that it would not withdraw its motion to disqualify VE, Northwest moved to disqualify Weil, Gotshal on July 13.

American rests its motion to disqualify Vinson & Elkins on VE's representation of American in prior antitrust matters and its alleged agreement to represent it in this case. According to American, Vinson & Elkins has served as its "Houston antitrust counsel since 1987." In this role VE defended American in suits by Continental and a Continental affiliate. VE also provided antitrust advice in connection with American's possible acquisition of Continental.

On July 24, after extensive briefing and the submission of numerous affidavits, the district court denied both motions to disqualify counsel. The court held that VE's initial acceptance of the American representation was a "mixup," that the past matters in which VE had represented American were only "tangentially related to this litigation," and that any confidential information possessed by VE was "not sufficient to cause any material prejudice to [American]." The court directed the parties to submit a plan for a Chinese Wall to safeguard against adverse use of

confidential information in the case. American then filed the petition for writ of mandamus now before us.

II

We must first determine our jurisdiction. Orders denying motions to disqualify counsel are not appealable before final judgment under 28 U.S.C. § 1291. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375, 101 S. Ct. 669, 674, 66 L. Ed.2d 571 (1981); *see also Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 105 S. Ct. 2757, 86 L. Ed.2d 340 (1985) (extending rule to orders granting motions to disqualify). While holding that disqualification orders are not immediately appealable as a matter of course, the *Firestone* Court indicated that a writ of mandamus might be available "in the exceptional circumstances for which it was designed." *Firestone*, 449 U.S. at 378 n. 13, 101 S.Ct. at 676 n. 13; *Koller*, 472 U.S. at 435, 105 S. Ct. at 2763. American contends that this case presents the requisite "exceptional circumstances."

The standards are well established: "[P]etitioners must show that they lack adequate alternative means to obtain the relief they seek . . . and carry the 'burden of showing that [their] right to issuance of the writ is "clear and indisputable."'" *Mallard v. United States Dist. Ct. for the S. Dist. of Iowa*, 490 U.S. 296, 309, 109 S. Ct. 1814, 1822, 104 L. Ed.2d 318 (1989) (citations omitted); *In re Fibreboard Corp.*, 893 F.2d 706, 707 (5th Cir. 1990); *In re Wily*, 831 F.2d 545, 549 (5th Cir. 1987). The test contains two prongs, one procedural and one substantive, and unless American demonstrates that it lacks an adequate alternative means to obtain relief,

we need not consider whether its right to a writ of mandamus is "clear and indisputable."

Courts confronting this question have suggested that "[d]enial of a motion to disqualify counsel will rarely justify the issuance of a writ of mandamus." *In re Ford Motor Co.*, 751 F.2d 274, 275 (8th Cir. 1984); *see also In re Mechem*, 880 F.2d 872, 873 (6th Cir. 1989); *In re Bushkin Assocs., Inc.*, 864 F.2d 241, 243-44 (1st Cir. 1989). We agree that frequent use of the writ would "'undermine [] the policy against piecemeal appellate review,'" *Mechem*, 880 F.2d at 875 (quoting *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101 S. Ct. 188, 191, 66 L. Ed.2d 193 (1980) (per curiam)), and thus we have stressed that "mandamus may not serve as a substitute for appeal." *Warren v. Bergeron*, 831 F.2d 101, 103 (5th Cir. 1987). We also have recognized, however, that the standard governing the availability of mandamus is not "never," but "hardly ever." *Allied Chemical*, 101 S. Ct. at 190. Thus, this court has recently held that a writ of mandamus will be available in certain cases to obtain immediate review of a district court's denial of a disqualification motion. *In re Dresser Industries*, 972 F.2d 540 (5th Cir. 1992). *See also In re American Cable Publications, Inc.*, 768 F.2d 1194 (10th Cir. 1985) (issuing writ on petition to review a grant of disqualification motion); *Merle Norman Cosmetics, Inc. v. United States Dist. Ct., Central Dist. of Cal.*, 856 F.2d 98, 101 (9th Cir. 1988) (recognizing that "if petitioners' claims were wellfounded [sic], the damage would be irremediable," but denying writ on other grounds). As in *Dresser*, we find the special

circumstances of the present dispute sufficient to place it within that narrow class of cases warranting mandamus review.

American claims that immediate review of its disqualification motion is appropriate because it will otherwise suffer "irreparable harm" and also because "attorneys and clients throughout Texas need the benefit of this Court's guidance on this issue of grave importance." We agree. First, the nature and size of this litigation would seem to preclude effective appellate review upon final judgment. In addition, this case raises several questions pertaining to the proper interpretation and application of ethical standards in disqualification cases. As illustrated by our recent *Dresser* opinion, it is relevant to mandamus review that the "district court's order was not a mere discretionary one but rather turns on legal questions appropriate for appellate review." *In re Burlington N., Inc.*, 822 F.2d 518, 523 (5th Cir. 1987). It is also relevant that, as in *Dresser* and *Burlington*, "[t]he issues here also have importance beyond the immediate lawsuit." *Id.* at 523; *In re EEOC*, 709 F.2d 392, 394-95 (5th Cir. 1983). For these reasons, we hold that American has demonstrated the absence of an adequate alternative to mandamus review.

Having met the "procedural" requirement for a writ of mandamus, American must also demonstrate that its right to the issuance of the writ is "clear and indisputable." This test goes to the merits, and we pause only to set out the standard of review. The Supreme Court has indicated that "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to

a particular result is 'clear and undisputable.'" *Allied Chemical*, 101 S. Ct. at 191. In accord with these dictates, this court has held that a writ of mandamus should not issue merely because we believe that "we might have exercised the discretion vested in that court differently than the district court exercised it." *Matter of Hester*, 899 F.2d 361, 367 (5th Cir. 1990).

In this circuit, however, a district court's ruling upon a disqualification motion is not a matter of discretion. Rather, the appellate court "review[s] findings of fact for clear error 'while carefully examining the district court's application of relevant ethical standards.'" *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1569 (5th Cir. 1989) (quoting *Cossette v. Country Style Donuts, Inc.* 647 F.2d 526, 531 (5th Cir. 1981)). Conceding that abuse of discretion review is not appropriate, Northwest asserts that this case centers on disputed factual matters, and that the district court's findings deserve deference. Assuming *arguendo* that the district court made findings on these contested questions of fact, it is clear that the court was guided by a particular reading of the Texas Disciplinary Rules in making these relevant factual determinations. Whatever deference due the court's factual findings, little or no deference is proper in reviewing its interpretation of ethical rules. We have recently held that a "district court's interpretation of the state disciplinary rules [is] an interpretation of law, subject essentially to *de novo* consideration." *Dresser*, at 543. In accord with *Dresser*, our review of the district court's reading of the relevant ethical standards will be *de novo*.

III

We turn to the applicable law. The Local Rules of the Southern District of Texas provide that "[t]he Code of Professional Responsibility adopted by this court is the Code of Professional Responsibility of the State Bar of Texas, as amended from time to time." Tex. Rules of Court, Federal App. A, Rule 4B. Texas replaced the Texas Disciplinary Code with the Texas Disciplinary Rules of Professional Conduct in 1990. Recognizing the new Rules as an amendment of the old Code, this Court has applied the Rules. *See In re Medrano*, 956 F.2d 101, 102 n. 3 (5th Cir. 1992). The parties do not contest application of the Rules.

We have recently held, however, that the Texas Rules, as adopted by the Southern District of Texas, are not the "'sole' authority governing a motion to disqualify." *Dresser*, at 543. In reviewing a motion to disqualify, "we consider the motion governed by the ethical rules announced by the national profession in light of the public interest and the litigants' rights." *Id.* As *Dresser* indicates, our precedents have applied the ethical canons contained in the ABA Model Code. *See, e.g., Brennan's Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168 (5th Cir. 1979); *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir. 1976).

The parties' extensive citation of this court's precedents applying the ABA Model Code suggests their recognition that the Texas Rules, as adopted by the Southern District of Texas, are not the "sole" authority governing this case. Moreover, we do not believe that our holding in *Dresser* has rendered the parties'

arguments grounded in the Texas Rules irrelevant to our decision. The Texas Rules were patterned after the ABA Model Rules of Professional Conduct, which the *Dresser* court cited along with the Model Code as the national standards utilized by this circuit in ruling on disqualification motions. Since the relevant ABA Rules do not differ materially from the corresponding Texas Rules, the parties' interpretations of the Texas Rules are equally applicable in this case. Our discussion will therefore center on the Texas Rules.

As we confirmed in *Dresser*, "[m]otions to disqualify are substantive motions affecting the rights of the parties and are determined by applying standards developed under *federal law*." *Dresser*, at 543; *see also In re Snyder*, 472 U.S. 634, 105 S. Ct. 2874, 2881 n. 6, 86 L. Ed.2d 504 (1985); *In re Finkelstein*, 901 F.2d 1560, 1564 (11th Cir. 1991); *United States v. Miller*, 624 F.2d 1198, 1200 (3d Cir. 1980); *Cord v. Smith*, 338 F.2d 516, 524 (9th Cir. 1964). Federal courts may adopt state or ABA rules as their ethical standards, but whether and how these rules are to be applied are questions of federal law. We stress this because Northwest contends that the Texas Rules control the discretion of a district court. According to Northwest, "a trial court is not forced by literalism or mechanical standards to do injustice serving the mere litigation tactics of a party. Rather, a trial court, *according to the Rules*, is to determine if there is actual prejudice or threatened interference with the fair administration of justice." *See* Texas Rule 1.06 Comment 17; ABA Rule 1.7 Comment.

As we have indicated, disqualification cases are governed by state and national ethical standards adopted by the court. We disagree with Northwest's suggestions that these sources also determine the discretion of a district court applying these rules. That issue is one governed by federal law.

Some courts have taken the position Northwest advances, namely that "[t]he business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it." *W.T. Grant Co. v. Haines*, 531 F.2d 671, 677 (2d Cir. 1976); *Board of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979); *Armstrong v. McAlpin*, 625 F.2d 433, 445-46 (2d Cir. 1980). *See also* SUTTON, HOW VULNERABLE IS THE CODE OF PROFESSIONAL RESPONSIBILITY?, 57 N.C. L. Rev. 497, 514-16 (1979). An attorney's ethical violation by itself does not warrant disqualification under this approach. Rather, disqualification is proper only in cases where a court also finds that the unethical conduct threatens to taint the trial. This more limited test largely rests on a belief that disqualification motions are often made for tactical reasons such as delay or harassment. While the "taint" standard "fails to correct all possible ethical conflicts," *Armstrong*, 625 F.2d at 445, it is argued that this limited disqualification rule serves to deter many meritless, tactical motions that would otherwise be filed.

This circuit, however, has struck a different balance, electing to remain "sensitive to preventing conflicts of interest." *Matter of Consolidated Bankshares, Inc.*, 785 F.2d 1249, 1256 (5th

Cir. 1986). We have squarely rejected this hands-off approach in which ethical rules "guide" whether counsel's presence will "taint" a proceeding, holding instead that a "[d]istrict [c]ourt is *obliged* to take measures against unethical conduct occurring in connection with any proceeding before it." *Woods v. Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976) (emphasis added); *Musicus v. Westinghouse Elec. Corp.*, 621 F.2d 742, 744 (5th Cir. 1980); *E.F. Hutton & Co. v. Brown*, 305 F.Supp. 371, 376-77 (S.D.Tex. 1969); *see also Kevlik v. Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984) ("the district court has the duty and responsibility of supervising the conduct of attorneys who appear before it"); *Trust Corp. v. Piper Aircraft Corp.*, 701 F.2d 85, 87 (9th Cir. 1983) (same); *United States v. Agosto*, 675 F.2d 965, 969 (8th Cir. 1982) (same). For this reason, we have emphasized that "[a] motion to disqualify counsel is the proper method for a party-litigant to bring the issues of conflict or breach of ethical duties to the attention of the court." *Musicus*, 621 F.2d at 744. We recognize of course that disqualification motions may be used as "procedural weapons" to advance purely tactical purposes. But we do not believe that a priori assumptions concerning the motivations underlying disqualification motions in general justify a more relaxed ethical rule. Our prior cases disclose that a careful and exacting application of the rules in each case will separate proper and improper disqualification motions.

Our rejection of the "taint" standard finds additional support in the questionable nature of the assumptions underlying

the test. First, the "taint" standard rests on a belief that "ethical conflicts surfacing during a litigation are generally better addressed by the 'comprehensive disciplinary machinery' of the state and federal bar." *Armstrong*, 625 F.2d at 446 (quoting *Nyquist*, 590 F.2d at 1246)). It is not clear that the vitality of state enforcement is relevant to the judicial duty of the federal courts to clean its own house. Policy aside, it is equally uncertain that the disciplinary boards have performed this role. Moreover, clients and fellow attorneys have little incentive to file formal complaints with disciplinary boards, and the evidence suggests that they in fact do not. This is especially true in cases of alleged conflicts of interest. *See* DAVID B. WILKINS, WHO SHOULD REGULATE LAWYERS?, 105 Harv.L.Rev. 799, 827-28 (1992); Note, DEVELOPMENTS IN THE LAW -- CONFLICTS OF INTEREST IN THE LEGAL PROFESSION, 94 Harv. L. Rev. 1244, 1496-1500 (1981). To a very large extent, unless a conflict is addressed by courts upon a motion for disqualification, it may not be addressed at all. More to the point, it is our business -- our responsibility.

Second, we believe that today there is less reason to suspect tactical motivations behind disqualification motions than at the time the "taint" standard was initially formulated in the 1970's. This is not due to any moral transformation of the bar, but to the relative absence of tactical advantages that might be secured by disqualification orders under today's law. At that time, disqualification orders were immediately appealable; the greatest tactical advantage offered by these motions was delay, as the trial

proceedings were halted while the motion went up on appeal. *See, e.g., Nyquist,* 590 F.2d at 1246. Under the *Firestone* regime, however, disqualification motions are not appealable prior to final judgment, thus severely limiting any advantages a party might have achieved through delay. *See Armstrong,* 625 F.2d at 452 n. 2 (Newman, J., concurring in part and dissenting in part).

Accordingly, we will rigorously apply the relevant ethical standards in reviewing American's disqualification motion, just as we have done in the past. *See, e.g., Johnston v. Harris County Flood Control Dist.,* 869 F.2d 1565, 1569 (5th Cir. 1989); *Doe v. A Corp.,* 709 F.2d 1043, 1046 (5th Cir. 1983); *In re Corrugated Container Antitrust Litigation,* 659 F.2d 1341 (5th Cir. Unit A Oct.1981); *Duncan v. Merrill Lynch Pierce, Fenner & Smith, Inc.,* 646 F.2d 1020 (5th Cir. Unit B June 1981). We will now examine the three arguments offered by American in support of its motion to disqualify Vinson & Elkins from representing Northwest.

IV

American first argues that VE must be disqualified from representing Northwest because a law firm may not switch sides in the same case. According to American, a binding attorney-client relationship between VE and American was formed when Alison Smith, a VE partner, agreed to represent American on June 10. VE's withdrawal from the American representation and acceptance of the Northwest representation on June 11 was a switch of sides in the same case, a clear violation of legal ethics.

Texas Rule 1.06(a) provides that "[a] lawyer shall not represent opposing parties to a litigation." As American indicates, this rule applies even in cases where an attorney-client relationship has not been formed: A lawyer may not "switch[] sides and represent[] a party whose interests are adverse to a person who sought in good faith to retain the lawyer." Texas Rule 1.09 Comment 4A; *see also* HAZARD & HODES, THE LAW OF LAWYERING § 1.9:111 (1991). The parties agree that Alison Smith agreed to represent American on behalf of VE on June 10, and that Harry Reasoner formally agreed to represent Northwest on June 11. There are significant differences, however, on several points that bear on the dispositive question of whether American sought to retain VE in good faith.

On June 5, 1992, Northwest, through Joe Jamail, spoke to Harry Reasoner, managing partner of VE, about the possibility of VE serving as Northwest's co-counsel in a suit against American. After checking to see whether American was a current client and reviewing the matters that VE had handled for American in the past, Reasoner promised Jamail that VE would accept no other representation of an airline until he had the chance to discuss the matter further.

On June 9, David Schwarte of American, after first attempting to reach Reasoner, called Alison Smith, another VE partner. Schwarte asked Smith if VE would represent American in a suit that Continental had filed against it in Galveston. Unaware of the previous discussion between Jamail and Reasoner, Smith

stated that she would be "delighted" to take on the case, but added that she would first have to run a conflicts check. American sent VE copies of the complaints filed against it later that day.

Smith called Schwarte at around 9:00 a.m. the next morning, June 10. When Smith stated that the conflicts question had not yet been resolved, Schwarte asked if there was a problem with Northwest. Smith responded that no such conflict was apparent. Smith and Schwarte then discussed American's possible litigation strategy, focusing on American's desire to transfer the Galveston case to Chicago.

A disputed conversation between David Boies of Cravath, Swaine & Moore, lead counsel for Continental, and Ira Millstein of Weil, Gotshal & Manges, lead counsel for American, occurred at about 9:30 a.m. According to Boies, Millstein stated that he hoped to retain VE to represent American in the Galveston case. Boies responded that this probably was not possible, for it was his understanding that VE would be representing Northwest in a suit against American. Millstein, however, asserts that he told Boies that VE *would* be representing American in Galveston, and that Boies responded that VE *might* have a conflict with Northwest, not that VE was going to sue American on Northwest's behalf.

At 10:30 a.m., Smith informed Schwarte that there were no conflicts that might prevent VE from representing American. Upon hearing this, Schwarte asked Smith if there was any reason why "we" could not begin to act as a team. Smith responded that she did not see why not. The two again spoke of American's desire to

transfer the Galveston case to Chicago. Schwarte asked Smith to begin thinking about this question and told her that he would send her a memorandum on the subject prepared by Weil, Gotshal attorneys. After the call, Smith left Reasoner a note in his office, stating that she had accepted the American representation in the Galveston case.

Reasoner learned of Smith's acceptance of the American representation when he called his office around 12:30 p.m. He advised Smith to explain to Schwarte that until Smith and Reasoner were able to discuss the matter, it was uncertain whether VE would be able to accept. Smith called Schwarte at 2:20 p.m. The contents of this conversation are in dispute. According to Smith, she told Schwarte that Reasoner had informed her that there was a problem with VE representing American. Schwarte responded that he was not surprised, for he had learned from Millstein that Reasoner had spoken to Northwest about suing American. According to Schwarte, however, Smith stated only that she had received a "cryptic note" from Reasoner indicating that "there might be a problem with Northwest." Schwarte swears that he made no mention of the possibility that VE might represent Northwest. At 3:45 p.m., VE received a copy of the memorandum prepared by Weil, Gotshal that Smith and Schwarte had discussed earlier.

Schwarte and Smith spoke again at 5:30 p.m. Smith informed Schwarte that the "problem with Northwest" had not yet been resolved. Schwarte stated that he needed to know as soon

as possible in order to make other arrangements if it turned out that VE could not represent American. At 5:45 p.m., Reasoner told Smith that he planned to read the complaints in the case and would speak to American the next day. Smith called Schwarte to convey this information.

Northwest alleges that Irv Terrell, a partner at Baker & Botts, informed Joe Jamail this same afternoon that Baker & Botts would be representing American. Both Terrell and Schwarte, however, sharply contradict this account, asserting that American did not retain Baker & Botts until the afternoon of June 11, after VE told American that it would be representing Northwest.

The next afternoon, June 11, Reasoner and Jamail agreed that VE would serve as co-counsel for Northwest. Reasoner then called various members of American's legal team with this news. Millstein at this time asked Reasoner if he could recommend other Houston counsel. Reasoner told him that Baker & Botts would be a good choice. On Reasoner's instructions, Smith returned unread the Weil, Gotshal memorandum she had received the day before. According to American, American retained Baker & Botts later that afternoon.

The parties' respective accounts of these events diverge at several significant points. The rule barring lawyers from switching sides in the same case applies only where the complaining party sought *in good faith* to retain the lawyer. Texas Rule 1.09 Comment 4A. Northwest's version of events might lead a court to question American's good faith. According to Northwest,

American's lead counsel was informed that VE would be representing Northwest in a suit against American *before* Alison Smith, who, unlike American, had no knowledge of VE's previous commitment to Northwest, agreed to represent American. Northwest also contends that American hired Baker & Botts during the afternoon of June 10, before VE's final decision that it would not represent American. Northwest alleges that American sent VE the confidential memorandum prepared by Weil, Gotshal after these two events, that is, with knowledge that VE would likely be representing Northwest and after it had hired Baker & Botts. These alleged facts, if accepted as true, might establish that American's efforts were motivated primarily by a desire not to secure representation from VE, but to ensure that VE would not, or could not, represent Northwest.

American, of course, contests Northwest's account, insisting that it had no knowledge of VE's prior commitment to Northwest and that it hired Baker & Botts on June 11, only after it was informed that VE would be representing Northwest. When American learned of VE's commitment to Northwest is a factual issue crucial to determining whether American sought VE's representation in good faith, as Texas Rule 1.06 requires. The district court made no factual findings on this issue. We need not remand for further fact finding because we hold that VE must be disqualified on other grounds.

V

American's final two contentions rest on VE's prior representations of the airline in antitrust matters. American contends that VE must be disqualified because VE has represented American in matters substantially related to the present case and VE's representation of Northwest in this case will likely involve the use to American's disadvantage of confidential information obtained during this earlier representation. We will first discuss the applicable ethical standards. We will then apply these standards to the prior representations alleged by American to warrant VE's disqualification.

A.

American contends that VE's prior representations of American make disqualification appropriate under this court's precedents and the Texas Rules. Our review in previous cases involving prior representations has been governed by the "substantial relationship" test:

> A party seeking to disqualify opposing counsel on the ground of a former representation must establish two elements: 1) an actual attorney-client relationship between the moving party and the attorney he seeks to disqualify and 2) a substantial relationship between the subject matter of the former and present representations.

Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1569 (5th Cir. 1989); *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1341, 1345 (5th Cir. 1981); *Duncan v. Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020, 1028 (5th Cir.), *cert. denied* 454

U.S. 895, 102 S. Ct. 394, 70 L. Ed.2d 211 (1981). Because it is not disputed that VE represented American in the matters under consideration, the sole issue is whether these prior representations are substantially related to the present case. Our inquiry may be narrowed to this single question because the substantial relationship test is governed by an irrebuttable presumption. Once it is established that the prior matters are substantially related to the present case, "the court will irrebuttably presume that relevant confidential information was disclosed during the former period of representation." *Duncan*, 646 F.2d at 1028; *Corrugated*, 659 F.2d at 1347.[1]

The test is categorical in requiring disqualification upon the establishment of a substantial relationship between past and current representations. But we have never applied the test in a mechanical way that might "prevent [] an attorney from ever representing an interest adverse to that of a former client." *Duncan*, 646 F.2d at 1027-28. Rather, a substantial relathionship may be found only after "the moving party delineates with specificity the subject matters, issues and causes of action" common to prior and current representations and the court engages in a "'painstaking analysis of the facts and precise application of precedent.'" *Duncan*, 646 F.2d at 1029 (quoting *Brennan's, Inc. v. Brennan's*

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[1] A second irrebuttable presumption is that confidences obtained by an individual lawyer will be shared with the other members of his firm. *See Corrugated*, 659 F.2d at 1346. This presumption is not at issue in this case, for all of the VE lawyers involved have previously represented American.

Restaurants, Inc., 590 F.2d 168, 174 (5th Cir. 1979)). Finally, the party seeking disqualification bears the burden of proving that the present and prior representations are substantially related. *Duncan*, 646 F.2d at 1028.

This circuit adopted the substantial relationship test before the promulgation of the Rules of Professional Conduct. We must decide the application of the substantial relationship test under these new Rules. Texas Rule 1.09 provides in relevant part:

> (a) Without prior consent, a lawyer who personally has formally represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
>
> . . . . .
>
> (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
>
> (3) if it is the same or a substantially related matter.

Rule 1.09(a)(2) incorporates Rule 1.05, which prohibits a lawyer's use of confidential information obtained from a former client to that former client's disadvantage. Rule 1.09 thus on its face forbids a lawyer to appear against a former client if the current representation in reasonable probability will involve the use of confidential information *or* if the current matter is substantially related to the matters in which the lawyer has represented the former client.[2]

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[2] ABA Rule 1.9 is identical to Texas Rule 1.09 in all important respects:

In providing two distinct grounds for disqualification, the Rules expand the protections for former clients beyond those afforded by the substantial relationship test. The Rules are not, however, broader than the protections provided by our precedents. While the focus of our cases has been on the substantial relationship test, we have indicated that a former client could also disqualify counsel by showing that his former attorney possessed relevant confidential information in the manner contemplated by Rule 1.09(a)(2). As *Duncan*, for example, stated: "[The moving party may disqualify counsel on the basis of prior representations] either by establishing that the prevent and previous representations are substantially related or by pointing to specific instances where it revealed confidential information regarding its practices and procedures." *Duncan*, 646 F.2d at 1032. Thus, it does not appear that the Texas Rules make material addition to the basic approach we have used in the past.

> (a) A lawyer who has formally represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation . . . .
>
> (c) A lawyer who has formally represented a client in a matter . . . shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client . . . .

ABA Rule 1.9.

But do the Rules take something away? That is, do the Rules offer less protection to former clients than our precedents? Northwest offers two related arguments on this score. First, Northwest contends that a substantial relationship between past and current matters exists only where the two cases are so closely related that the risk of adverse use of the former client's confidences threatens to "taint" the trial. Northwest also agues that a close relation between a past and current representation is irrelevant if the attorney relied on publicly available information in advising the former client. These two arguments are rooted in Northwest's larger assertion that the substantial relationship test is solely concerned with protecting a former client's confidences.

Northwest offers three distinct grounds in support of its "taint" standard. It first makes a brief attempt to locate this more demanding standard in *Duncan*. According to Northwest, *Duncan* provides that a party may establish a substantial relationship between past and current representations only be demonstrating that the two matters are so closely related that there is a "genuine threat that confidences revealed to his former counsel will be divulged to his present adversary." *Duncan*, 646 F.2d at 1028. *Duncan*, however, stands for a different proposition, for we held that a "genuine threat" of adverse use of confidences is established by showing that a prior representation is substantially related to the present case. *Id.* Under *Duncan*, a party demonstrates a "genuine threat" by establishing a substantial relationship between

past and present cases, not, as Northwest would have it, the other way around.

Northwest's other two arguments rest on its interpretation of Texas Rule 1.09's substantial relationship language. First, Northwest contends that the commentary to Rule 1.09 makes "abundantly clear" that the Rule's substantial relationship language is directed to "actual and genuine threats to the integrity of the trial process." Comment 8 to Rule 1.09 provides:

> Although not required to do so by Rule 1.05 or this Rule, some courts, as a procedural decision, disqualify a lawyer for representing a present client against a former client when the subject matter of the present representation is so closely related to the subject matter of the prior representation that confidences obtained from the former client might be useful in the representation of the present client. *See* Comment 17 to Rule 1.06.

Comment 17 provides that alleged conflicts should be raised by an opposing party only where the alleged "conflict is such as clearly to call in question the fair or efficient administration of justice." Northwest concludes that this commentary reveals that "the substantial relationship language of Rule 1.09 is bottomed on a concern about the actual fairness of the proceedings in which disqualification is sought."

Northwest also contends that the Texas Rules' conscious omission of the "appearance of impropriety" standard contained in Canon 9 of the Model Code independently establishes "taint" as the appropriate disqualification standard. Northwest points out that some of our broader substantial relationship cases, notably *In*

re Corrugated Container Antitrust Litigation, 659 F.2d 1341 (5th Cir. 1981), were decided under Canon 9. Northwest asserts that *Corrugated*'s broad language intimately tied to Canon 9's "appearance of impropriety" standard. Since the Texas Rules eliminated this rule, "disqualification is no longer appropriate unless counsel's continued involvement threatens to taint the underlying trial: a mere appearance of impropriety will not suffice."

We reject both of Northwest's arguments. A party seeking to disqualify counsel under the substantial relationship test need not prove that the past and present matters are so similar that a lawyer's continued involvement threatens to taint the trial. Rather, the former client must demonstrate that the two matters are substantially related. Second, we adhere to our precedents in refusing to reduce the concerns underlying the substantial relationship test to a client's interest in preserving his confidential information. The second fundamental concern protected by the test is not the public interest in lawyers avoiding "even the appearance of impropriety," but the client's interest in the loyalty of his attorney.

Northwest's argument that the Texas Rules' commentary bottoms Rule 1.09's substantial relationship language on a concern for "actual fairness" rests on its general interpretation of the Texas Rules. Northwest suggests that courts' use of disciplinary standards in disqualification matters is "understandable in courts that have not yet developed their own specific procedural disqualification rules or standards." Courts may borrow from the

rules, with two important qualifications: "First, any violation of a disciplinary standard must be demonstrated by movant to have been actually prejudicial to movant; and, second, disqualification should be denied unless the litigation will be 'tainted' by the continued participation of a lawyer or firm that may have violated a disciplinary standard."

This argument is closely related to Northwest's larger assertion that the Texas Rules are "guides" for courts and are not to be "literally" applied in disqualification cases. We addressed, and rejected this general argument in Part III. We understand this particular argument concerning the substantial relationship test to be something more than a reiteration of this general point. Northwest's initial argument was that a breach of an ethical standard does not by itself require disqualification; an additional showing of taint is needed. Here, Northwest appears to concede that such a breach requires disqualification, but asserts that the rule barring representation in substantially related matters is not violated unless the cases are so similar that there is a genuine threat of taint. We reject this argument. The substantial relationship test, as applied in this circuit and elsewhere, does not have its source in disciplinary rules. To the contrary, the test was developed at common law. Our precedents did not rely on the Model Code or Model Rules in formulating the substantial relationship test, but on the landmark *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F.Supp. 265 (S.D.N.Y. 1953), which predated the Model Code and of course the Model Rules. *See, e.g., Wilson P. Abraham*

Construction Corp. v. Armco Steel Corp., 559 F.2d 250, 252 (5th Cir. 1977); *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83, 89 (5th Cir. 1976).

The actual development of Rule 1.09's substantial relationship provision is the just the opposite of the version Northwest gives. The initial drafts of both the ABA and Texas Rules did not include a rule barring representation in substantially related matters. In both cases, the substantial relationship rule was added *as a reflection of case law. See* ROBERT P. SCHUWERK & JOHN F. SUTTON, JR., A GUIDE TO THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT, 27A Hous. L. Rev. 1, 152 n. 20, 153 n. 34 (1990); Note, IN DEFENSE OF THE DOUBLE STANDARD IN THE RULES OF ETHICS: A CRITICAL REEVALUATION OF THE CHINESE WALL AND VICARIOUS DISQUALIFICATION, 20 U. Mich. J.L. Ref. 245, 257 & n. 66 (1986) (ABA Rules). Schuwerk and Sutton's account is instructive:

> [T]he Texas committee originally avoided [the substantial related matter language] in proposed Texas Rule 1.09. . . Subsequently, however, a difficulty emerged as a result of failure to employ the substantial relationship test in a disciplinary context. A lawyer might accept or continue employment in a matter against a former client believing (correctly) that no disciplinary violation was involved under the initially proposed version of Rule 1.09, only to be disqualified subsequently -- perhaps at great cost and expenses to the client -- by a court employing the traditional substantial relationship test . . . . The drafting committee, therefore, concluded that the danger of having its narrowly drawn Rule 1.09 turn into a trap for the unwary outweighed its objections to the substantial rela-

> tionship test as a standard of discipline. It would be in keeping with the committee's thinking, however, to construe "substantially related" narrowly for *disciplinary purposes.*

Schuwerk & Sutton, *supra*, at 153 n. 34 (emphasis added); *see also* Rule 1.09 Comment 9.

As this account suggests, the difficulty posed by Rule 1.09 does not concern the "literal and mechanical" application of a disciplinary rule in disqualification cases. Rather, the concern is the transfer of the substantial relationship test developed by courts to the disciplinary context. *See also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 366 (1986) (discussing ABA Rules' "adoption of the substantial relationship standard as a disciplinary rule"). Contrary to Northwest's contentions, the Rules did not supplant, but adopted, the common law substantial relationship test. The argument thus provides no basis for applying the substantial relationship test through the "taint" filter it proposes.

Northwest's argument concerning the Rules' deletion of Canon 9's appearance of impropriety standard has more purchase. Northwest argues that the Model Rules' omission of the "appearance of impropriety" standard contained in the Model Code indicates that the substantial relationship test should be solely concerned with ensuring "actual fairness" in the proceedings. But Northwest does not mention loyalty, itself a substantial addition under the Rules. As several commentators have noted, the Model Code provided no express protection to the former client's interest in loyalty. *See, e.g.*, GEOFFREY C. HAZARD & W. WILLIAM HODES, THE

LAW OF LAWYERING 292 (1991); Wolfram, *supra*, at 363 (1986). This interest is singled out only under the Rules. *See* Texas Rule 1.06 Comment 1 ("Loyalty is an essential element in the lawyer's relationship to a client"); ABA Rule 1.9 Comment ("The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters"); Hazard & Hodes, *supra*, at 292-93; Wolfram, *supra*, at 361; *Sutton*, *supra*, at 147; STEPHEN GILLERS, WHAT WE TALKED ABOUT WHEN WE TALKED ABOUT ETHICS: A CRITICAL VIEW OF THE MODEL RULES, 46 Ohio St.L.J. 243, 250-55 (1985).

The Rules' express establishment of loyalty and confidentiality as the interests protected by the substantial relationship test is a return to *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F.Supp. 265, 268-69 (S.D.N.Y. 1953), where the court held that once it is established that the two representations are substantially related,

> [t]he court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. *Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.*

Id. (emphasis added).

We believe the replacement of the "appearance of impropriety" with loyalty provides no basis for altering the

substantial relationship test found in our precedents. This is because we read our cases involving Canon 9 as protecting the same interest in loyalty now explicitly provided for under the Rules. As the Comment to ABA Rule 1.9 notes, "[r]epresentation adverse to a former client was sometimes dealt with under the rubric of Canon 9 of the Model Code." This was true of this court as well as others.

The link between loyalty and the appearance of impropriety is most evident in *Brennan's Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168 (5th Cir. 1979), where the court disqualified a former counsel even though there was no chance that confidential information might be used against the former client. We held:

> The obligation of an attorney not to misuse information acquired in the course of representation serves to vindicate the trust and reliance that clients place in their attorneys. A client would feel wronged if an opponent prevailed against him with the aid of an attorney who formerly represented the clients in the same matter. As the court recognized in *E.F. Hutton & Co. v. Brown*, 305 F.Supp. 371, 395 (S.D. Tex. 1969), this would undermine public confidence in the legal system as a means for adjudicating disputes.

590 F.2d at 172. As Professors Hazard and Koniak observe: "In *Brennan's*, the Court recognizes two underlying concerns of the substantial relationship test: the duty to preserve confidences and the duty of loyalty to a former client." GEOFFREY C. HAZARD & SUSAN P. KONIAK, THE LAW AND ETHICS OF LAWYERING 658 (1990). *See also E.F. Hutton & Company v. Brown*, 305 F.Supp. 371, 395 (S.D.Tex.

1969) ("If courts protect only a client's disclosures to his attorney, and fail to safeguard the attorney-client relationship itself -- a relationship which must be one of trust and reliance -- they can only undermine the public's confidence in the legal system as a means for adjudicating disputes."); *Duncan*, 646 F.2d at 1027 ("the integrity of the judicial system would be sullied if courts tolerated such abuses by those who profess and owe undivided loyalty to their clients"); *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83, 90 (5th Cir. 1976) (prohibition of representation of conflicting interests rests on lawyers duties of loyalty and confidentiality); *Cf. In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 161-62 (3d Cir. 1984); *In re Agent Orange Product Liability Litigation*, 800 F.2d 14, 17-18 (2d Cir. 1986).

As these decision suggest, the existence of a lawyer's duty of loyalty means that the substantial relationship test is not solely concerned with the adverse use of confidential information. What the duty of loyalty adds to the duty of confidentiality is clearly presented in *Corrugated*:

> Container's complaint is that the district court failed to explain how [the lawyer's] *advice* would be relevant or substantially related to this action. The *advice* does not need to be "relevant" in the evidentiary sense to be "substantially related." It need only be akin to present action in a way reasonable persons would understand as important to the issues involved.

Corrugated, 659 F.2d at 1346 (emphasis added).

We emphasize "advice" because a court solely concerned with the possible adverse use of confidential information might not be obliged to protect legal advice. As at least one court has noted, "the concern of the Confidentiality Rule and the case law is the protection of what the clients tells his attorney, *not what the attorney tells the client.*" *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 22, 40 (D.D.C. 1984) (emphasis added). We agree that the confidentiality rule was historically concerned with disclosures, but we are also persuaded that the substantial relationship test cannot be reduced to a confidentiality rule. *See* Texas Rule 1.07. That is, because the substantial relationship test is concerned with both a lawyer's duty of confidentiality *and* his duty of loyalty, a lawyer who has given advice in a substantially related matter must be disqualified, whether or not he has gained confidences.

We agree with Northwest that the "appearance of impropriety" has no relevance to our probe of ethical restraints. It does not follow, however, that the focus of the substantial relationship test now becomes the "actual fairness" of the trial. Such a shift is premised on the view that eliminating the appearance of impropriety reduces the substantial relationship test to a concern for confidential information. We believe that such a reduction is precluded by a lawyer's duty of loyalty. Because Canon 9 was primarily interpreted by the court as a way to protect a client's loyalty interests, we believe that our application of the substantial

relationship test under the Rules is the same as it was under the Code.

We believe that disqualification of VE would be appropriate even under the relaxed "actual prejudice" or "taint" standard Northwest urges this court to adapt. As we explain below, the relationship between the matters in which VE has represented American and the instant litigation is so intimate that VE's continued involvement does threaten to compromise the integrity of the present trial. Our continued adherence to the substantial relationship test rests on our belief that the ethical prohibition against successive representation cannot be reduced to the protection of clients' confidences, let alone protecting these confidences only to the extent that their adverse use might "taint" the trial, as Northwest's proposal would provide. Rather, a lawyer's obligation of confidentiality must be seen as part of the lawyer's primary duty of loyalty, a duty that is not exhausted by the preservation of a former client's secrets. We believe that a single inquiry into whether past and present representations are substantially related provides the best means to protect these two interests of clients.

Because it recognizes these two interests, the substantial relationship test serves not only to ensure the fairness of particular trials, but also to safeguard the integrity of the attorney-client relationship. If the sole focus of the substantial relationship test was the possible adverse use of confidences, prior representations in which the attorney advised the client but received no confiden-

tial information would not warrant disqualification. Even if the subject matter of case one and case two is identical, a former client's adversary is not inevitably advantaged by virtue of his attorney's prior representation of the client. And yet this court has held that the provision of legal advice on a substantially related matter by itself requires disqualification. *See Corrugated,* 659 F.2d at 1346-47; *Brennan's,* 590 F.2d at 171-72.

Disqualification rules not only preserve the purity of particular trials but also unavoidably affect relationships among attorneys and clients in general. This court bars attorneys from appearing in substantially related matters not only to protect individual parties against the adverse use of information but also "to aid the frank exchange between attorney and client." *Wilson P. Abraham Const. Corp. v. Armco Steel Corp.,* 559 F.2d 250, 252 (5th Cir. 1977); *see also In re Yarn Processing Patent Validity Litigation,* 530 F.2d 83, 90 (5th Cir. 1976). A post hoc inquiry into whether a particular attorney's involvement in a particular suit might "taint" the case in no way provides the breadth and "predictability of confidence [that] is central to the role of the attorney." *In re LTV Securities Litigation,* 89 F.R.D. 595, 602 (N.D.Tex. 1981); *cf. Upjohn Co. v. United States,* 449 U.S. 383, 101 S. Ct. 677, 683-84, 66 L. Ed. 584 (1981). The trust a lawyer's duty of loyalty inspires in clients encourages them freely to confide in the lawyer and freely to rely on the advice provided by the lawyer. The substantial relationship test aims to protect the adversary process but also, or as part of this concern, seeks to provide conditions for the

attorney-client relationship. What credence, for example, might American have attached to VE's December 1990 counsel that the airline's interests would be better served by postponing the acquisition of Continental for at least a year if it even suspected that VE itself might soon be representing one of its competitors in a suit against American, charging that it had abused its market power to the detriment of competition in the airline passenger service markets?

These considerations preclude us from accepting Northwest's final argument. Northwest claims that because VE relied primarily on public, not confidential, information in advising American, these prior matters cannot be considered substantially related to the present case. It contends that "'[f]acts that are community knowledge or that are not material to a determination of the issues litigated do not constitute "matters involved" within the meaning of the law' governing the substantial relationship test" (quoting *J.K. & Susie L. Wadley Research Inst. & Blood Bank v. Morris*, 776 S.W.2d 271, 278 (Tex. App.--Dallas 1989, orig. proceeding)). The record sharply contradicts Northwest's claim that all of the material obtained by VE was publicly available. As we discuss below, VE was privy to many of American's secrets. But Northwest's argument would fail even if it could show that all of the information provided by American was public knowledge. Our precedents, the Texas Rules, and the ABA Rules all reject the position Northwest advances. This court has held that "[i]nformation [provided by a client] is sheltered from use by the attorney

against his client by virtue of the existence of the attorney-client relationship. This is true without regard to whether someone else may be privy to it." *Brennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 172 (5th Cir. 1979). "'This ethical precept . . . exists without regard to the nature or source of information or the fact that others share the knowledge.'" *Id.* (quoting Model Code EC 4-4); *Doe v. A Corp.*, 709 F.2d 1043, 1046 (5th Cir. 1983) (same). *See also Emle Industries, Inc. v. Pantentex, Inc.*, 478 F.2d 562, 572-73 (2d Cir. 1973) ("[t]he client's privilege in confidential information disclosed to his attorney 'is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources for such information'") (quoting HENRY S. DRINKER, LEGAL ETHICS 135 (1953)); *NCK Organization Ltd. v. Bregman*, 542 F.2d 128, 133 (2d Cir. 1976) (same).

The Texas and ABA Rules supply the same standard. The Rules do contain an exception for public information, but in each case this exception applies only to the provision prohibiting use of confidential information, not the rule prohibiting the successive representation in substantially related matters. Texas Rule 1.05 provides that "a lawyer shall not knowingly

> (3) [u]se confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or *the confidential information has become generally known*."

Texas Rule 1.05 (b) (3) (emphasis added). This provision, however, is incorporated by Rule 1.09(a) (2), not the substantial relationship

rule contained in Rule 1.09 (a) (3). The same distinction exists between Rules 1.9(a) and 1.9(c) of the ABA Rules, as commentators have indicated. *See, e.g.*, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 360, 365 (1986).

We believe that our application of the substantial relationship test under the Rules is the same as it was under the Code. Thus, as in our past cases, our inquiry is limited to the single question of whether VE's prior representations of American are substantially related to the present case.

B.

VE represented American in several matters in recent years, earning fees in excess of $676,000. Our review will be limited to three of VE's prior representations. VE defended American in two suits brought by Continental in Texas. The focus of each case, as in the larger California litigation to which they were related, was SABRE, American's computerized reservation system. The first case, *System One Direct Access, Inc. v. American Airlines Inc.*, was an antitrust suit brought by a Continental affiliate in Houston federal court. VE served as counsel from November 1987 until withdrawing in July 1988 when the case was transferred to Dallas.

VE also served as lead counsel in *Continental Airlines, Inc. v. American Airlines, Inc.*, a Texas state court case. Continental alleged that American had breached contractual relationships and committed other acts of misconduct in operating its CRS. VE represented American from March 1989 until the case was settled

as part of the global settlement between Continental and American in May 1990.

In late 1990, VE advised American concerning whether the Antitrust Division of the Department of Justice would approve "Project Armadillo," a proposed acquisition of Continental Airlines. The primary question was whether a merger of the two airlines would run afoul of the Department's merger guidelines. The representation ended in January 1991, when American apparently chose not to pursue the merger.

The two Texas cases were related and subsidiary to a larger suit by Continental and Northwest, among others, against American and United Airlines in California federal district court in 1985. Continental and Northwest charged American and United with monopolization of both computerized reservation systems and various air transportation markets.[3] In particular, they charged predatory pricing of CRS systems and air transportation, closely related to the claim advanced by Northwest and Continental here.

American asserts, and Northwest appears to concede, that the California case is substantially related to the present case. However, Gibson, Dunn & Crutcher, not VE, represented American in California, so the similarities between the California case and the present one provide no basis for disqualification. Ameri-

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[3] *See In re Air Passenger Computer Reservations Systems Antitrust Litigation*, 694 F.Supp. 1443 (C.D.Cal. 1988); *aff'd Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 1603, 118 L. Ed.2d 316 (1992).

can's argument that VE's prior representations are substantially related to this case rests largely upon its claim that the Texas cases are substantially related to the California case.

Northwest argues that the Texas cases are not substantially related to this case because the allegations in these cases, unlike in California, pertained only to CRS services, not air transportation services. We disagree. While the focus was certainly CRS systems, the plaintiffs also raised claims involving air transportation markets. Moreover, as we will explain, the Texas cases involved two particular matters at issue in the present case.

(1) Fort Bend

Fort Bend involved the state-law claims over which the California district court, upon American's motion to dismiss, had declined to exercise pendent jurisdiction. Continental alleged breach of contract, duress, tortious interference, misrepresentation, and violation of the Texas Deceptive Trade Practices Act. As in California, Continental's petition focused on American's CRS operations. But also as in California, Continental asserted that American's power in the CRS market could not be considered apart from its position in the air transportation market. Continental claimed that "American and United, by leveraging their dominance as air carriers and the enormous secret profits they received from bias-diverted revenues, established themselves as the dominant CRS providers." Continental charged that American, having achieved dominance in the CRS market, in turn used SABRE to "exclude[] Continental in whole or in part from specific

airline passenger markets." Continental's claims were stated in a similar manner. Continental claimed that American had breached its contract by "secretly accessing TXI'S [a Continental affiliate] data base and using it to study passenger traffic flow through the Dallas/Fort Worth hub. Reports developed by American through the use of the TXI data contributed to American's successful exclusion of TXI from the Dallas/Fort Worth hub and elsewhere." In its tortious interference claim Continental alleged that American had "interfered with Continental's prospective contractual relations with its travel agents and air passengers," causing damages in the form of "lost airline bookings through bias diversions and total exclusion from certain air passenger markets." Finally, Continental noted that the California district court had cited American President Robert Crandall's alleged 1982 price- fixing solicitation of Braniff as "a textbook example of anticompetitive conduct" in ruling that "Continental could proceed to trial on its claim that American illegally attempted to monopolize the Dallas-Fort Worth airport."

Continental's allegations and its reference to Crandall's alleged price-fixing solicitation apparently supplied the basis for the belief among VE and Gibson, Dunn lawyers that American's alleged attempted monopolization of DFW would be at issue in the case and that Continental might seek to introduce the price-fixing incident as evidence on this score. As such, they believed that Fort Bend was intimately related to the California case. For example, a VE partner stated at the time that the

California and Fort Bend suits "involve the same parties, the same alleged acts, and the same alleged damages." Another VE lawyer noted that the two suits could be seen as "largely identical": "[The Fort Band petition] asserts that AA and UA used their purported CRS monopolies to obtain monopoly power in certain air transportation markets. This claim is intertwined with both the CRS monopolization and DFW attempted monopolization claims pending in California." The perceived similarities between Fort Bend and the California case led VE and Gibson, Dunn to spend considerable time exploring the possibility of an abatement of the Fort Bend case until the California proceedings had concluded.

VE argues that Crandall's alleged price-fixing solicitation and Continental's claim that American had used its CRS to exclude it from the DFW market were not at issue in Fort Bend. This contention in contradicted by the accounts of Gibson, Dunn lawyers and by notes taken by a VE lawyer during one meeting between VE and Gibson, Dunn. While it is difficult to reconstruct a conversation from this distance, we are struck by the first two comments on the first page of notes: 1) "There is no admissible evidence of the Crandall telephone conversation on Braniff; may use it on a consequential damages theory that Continental excluded from DFW market." 2) "We should argue that the exclusion claim is being litigated in California and should not be litigated in Texas." Given the allegations in the complaint, the statements of VE's lawyers at the time, and this evidence it is

difficult to maintain that these matters were not at issue in Fort Bend.

The charges of monopolization of DFW and Crandall's alleged solicitation are prominently featured in Northwest's current complaint. Northwest alleges that American has monopolized or attempted to monopolize five different air transportation markets. Dallas-Fort Worth is included as an "illustrative example" in three of the five markets cited by Northwest: origin and destination city pair markets, 0 & D airport-airport pair markets, and 0 & D based hub markets. It cannot be denied that one focus of the case will be American's DFW operations, the very market at issue in Fort Bend.

Similarly, Northwest contends in its complaint that "AA and its current chief executive officer have previously engaged in anticompetitive conduct with open contempt for the antitrust laws." Northwest prominently cites Crandall's alleged price-fixing solicitation, the same allegation that VE lawyers were charged with excluding in the Fort Bend case. VE suggested at oral argument that Crandall's alleged solicitation is not substantially related to the present case because this ten-year old incident would not be admitted as evidence. This is helpful but not dispositive. As the *Corrugated* court stated, the subject matter "does not need to be 'relevant' in the evidentiary sense to be 'substantially related.' It need only be akin to the present action in a way reasonable persons would understand as important to the issues involved." *Corrugated*, 659 F.2d at 1346. Northwest included the

incident under the heading "Conduct Giving Rise to Violations Alleged" in its complaint. This is not easily explained away, especially given Northwest's heavy reliance on the location of the Crandall allegation in the Fort Bend petition's "procedural history" in attempting to prove that the incident was not at issue in *that* case.

We are persuaded that VE's representation of American in the Fort Bend case is substantially related to the present case.

(2) System One

In System One, Continental affiliate System One, a CRS vendor, charged that American had violated antitrust laws in its provision of CRS services. System One alleged that American had engaged in a variety of acts designed to exclude it from the CRS market. But as in Fort Bend, plaintiff presented the CRS and air transportation markets as inextricably linked. The System One complaint alleged that "AA has used its monopoly power in the provision of air carrier services in various geographic markets to obtain, retain, and enhance its power in the provision of CRS systems." Again, "AA has achieved its dominant position in the market for CRS services, and continues to enforce anticompetitive practices in an effort to maintain that position, not only to reap monopoly profits from the sale and use of CRS systems, but to enhance profits from the provision of air transportation services."

The record reflects extensive discovery regarding SABRE's effects on air transportation revenues. System One requested all documents relating to the "incremental revenues," the general

effect of "airline ownership of a CRS on the airline's sale of air transportation services," and "any actual or possible loss of revenue or other detriment to any commercial air carrier as a result of the operation or installation of SABRE." In response, American agreed to produce all documents "that discuss, study, or analyze whether, and the extent to which, any airline (including American) which owns a CRS obtains incremental airline revenue as a consequence of automating travel agencies with its CRS" as well as "documents discussing whether American has a 'premium share' of the traffic in a particular region or market and whether this is attributable to the presence of SABRE in that region or market."

In the absence of this prior litigation, there in little doubt that Northwest would seek to introduce evidence of the incremental revenues generated by SABRE in support of the predatory pricing claims it raises in this case. Northwest's General Counsel recently asserted in congressional testimony that American's ability

> to restructure and reduce its fares dramatically is directly related to American's long-term, advantageous use of its CRS . . . . DOT studies repeatedly have documented the flow of hundreds of millions of dollars of incremental revenue diverted from other carriers to American and United as a result of their CRS market power . . . "[I]n a very real sense, American has launched its predatory attack on the industry using our own money.

It is the case that challenges by Northwest and Continental of American's CRS use have been earlier terminated in ways

restricting their present assertion, Continental by settlement and Northwest by a final judgment. Pointing to these outcomes, VE states that it will not, because it cannot, raise any issues relating to CRS in this case. Any attempts to redress perceived CRS abuses by American will be confined, as the congressional testimony suggests, to the legislature. Since American's CRS operation will not be at issue, VE contends that its representation of American on this matter cannot be substantially related to this case. Northwest in particular claims that the issues of incremental revenue and costs addressed in System One relate to CRS use and are quite different from the general airline revenue and cost issues at the center of this case.

We recognize that several possible claims relating to CRS might be barred by res judicata and we do not question Northwest's representations in this court and below that the present litigation will involve no attacks on American's CRS use. We are not persuaded, however, by Northwest's argument that a party's representation that matters in which a lawyer represented a former client cannot, or will not, be introduced in the present case precludes a court from finding these matters substantially related to the prior representations. The exact scope of categories such as "CRS matters," especially at the early stage of the litigation when motions to disqualify are often considered, is unclear, and leaves much room for good faith dispute among the parties. The party who either lost in the previous case or represented to the court that certain matters will not be raised will attempt to define the

sphere of these issues narrowly, while the party who prevailed in the earlier case or filed an unsuccessful disqualification notion will naturally attempt to define the precluded matters quite broadly. In the particular case of res judicata, it places the former counsel in the position of attempting to minimize the beneficial results of her prior representations by limiting their effect in the present case.

The facts of this case disclose how such a dispute might arise. Northwest claims that System One involved the particular matter of incremental revenues obtained by American through ownership of a CRS. Northwest states that the focus in this case will be on wholly different matters such as American's marketing strategy, ticket pricing, and general airline costs and revenues. The line between incremental revenues and general revenues, however, does not appear as distinct as VE suggests. Moreover, American hotly disputes VE's contention that discovery in System One was limited to the narrow issue of incremental revenues. To the contrary, American asserts that the VE lawyers reviewed and discussed documents relating to marketing strategy and general air transportation revenues and costs, the very matters Northwest identifies as the heart of the instant case.

There is another matter involved in System One that Northwest has indicated will be at issue in this case. Northwest must focus at trial upon barriers to entry into the relevant markets. In its complaint, Northwest lists among these barriers "the role of travel agents in the industry and incentive commissions paid by

airlines to travel agents and other marketing programs and devices." Incentive or override commissions in particular were at the center of the System One case.

System One charged that American used override commissions as a means to exclude it from the CRS market: "AA conditioned the payment to travel agents of commissions on AA ticket sales on their agreement to use the SABRE system." As System One explained, this arrangement worked especially well in those areas where American was the dominant air carrier. In connection with this claim, American agreed to produce and searched for "[d]ocuments that describe or discuss American's policies and procedures regarding participation by travel agencies in any override, special incentive or 'soft dollar' commissions program offered by American." American asserts, and Northwest does not appear to contest, that VE lawyers reviewed much of this material. A VE lawyer and several VE paralegals spent more than ten weeks reviewing documents at American's offices. Gibson, Dunn lawyers who were involved claim that a VE lawyer personally reviewed documents relating to marketing strategy and air transportation issues. The materials submitted with the Gibson, Dunn affidavits provide additional support for these claims. VE 's description of its work on the case does little to contradict these accounts. Its response is limited to a statement by the lawyer that he has no specific recollection of documents reviewed and that he does not believe, "given the nature of the case," that he "reviewed any documents relating to American's pricing of airline transportation."

Northwest contends that the presence of the issue of override commissions in System One and the instant case does not make the two representations substantially related. Northwest argues that the two cases are not related because in System One the commissions were alleged to be a barrier to entry into the CRS market, while here they represent a barrier to entry into the air transportation market. Regardless of the direction of the block the trial must focus on the exclusionary force of CRS--its power to exclude competition in CRS is the handmaiden of its exclusionary force on airline passenger service.

We therefore find Northwest's purported distinction unavailing. *Corrugated* and *Duncan* provide that two representations need only involve the same "subject matter" in order to be substantially related. *See Corrugated, supra*; *Duncan, supra*. As the summary of the document request quoted above discloses, VE lawyers reviewed documents relating to travel agency commissions in general, not simply those documents referring to the alleged practice of tying such commissions to CRS use. A substantial relationship exists when the prior representation concerns "the particular practices and procedures which are the subject matter of [Northwest's] suit." *Duncan*, 646 F.2d at 1032. Both System One and the present case involve American's travel agency commission "practices and procedures." Given that the two cases sharing this "subject matter" allege similar antitrust violations, we find VE's representation of American in System One substantially related to its present representation of Northwest.

(3) Project Armadillo

VE represented American most recently in "Project Armadillo," an American proposal to acquire Continental. VE provided American with antitrust analysis of the proposal, focusing on whether a merger of the two airlines could avoid challenge under the Department of Justice antitrust merger guidelines. VE's representation began in late November 1990 and concluded in early January 1991, when American chose not to pursue the acquisition.

As a memorandum prepared by American explained, the Department of Justice merger guidelines' main concern is "whether the merger will likely create, enhance or facilitate the exercise of market power--the ability to raise prices to supracompetitive levels--by the remaining participants in the relevant market." Market power is more easily inferred under narrowly defined markets, and it was therefore in American's interest to avoid "[a] market definition that is improperly narrow," for this would "result in such a high level of concentration that, inevitably, a court will conclude the merger poses an incipient threat to competition."

These same issues are at the heart of the present case. Northwest alleges that American has monopolized or attempted to monopolize the national air transportation market as well as four smaller geographic markets involving city pairs and regions. Because American enjoys a greater share of particular regional markets, Northwest will no doubt attempt to prove at trial that

these smaller markets are relevant. To this end, Northwest cites four instances where American has allegedly indicated that O & D and regional passenger markets are relevant markets.

VE asserts that its "narrow, limited, and brief" role in Project Armadillo cannot serve as the basis for disqualification in the present case. Northwest contends that some VE lawyers alleged by American to have worked on Project Armadillo were not in fact involved. A VE memorandum summarizing the initial meeting between American and VE lawyers, however, includes a notation directing that a copy of the memo be sent to these same lawyers whose involvement in the matter VE denies. Similarly, VE attempts to minimize the significance of the materials it received from American by suggesting that the materials were not even read by certain VE lawyers involved in the representation. The billing statements submitted by VE to American, however, disclose that each of the VE lawyers in question devoted time to "review-[ing] materials furnished by [the] client."

We have no reason to suggest that VE's misstatements are other than oversights, and, because they pertain only to the degree of its involvement in Project Armadillo, are secondary to the main question of the subject matter of VE's representation. Northwest contends that VE's representation of American does not warrant disqualification for two related reasons. Northwest asserts that VE was charged with a single "narrow, straightforward question" to which the answer was "obvious": Would the Justice Department oppose a complete merger of Continental and American on

antitrust grounds? Northwest claims that the problem posed to VE required little detailed analysis and that all the information needed by VE to reach its conclusion "was and is publicly available." Because VE required no confidential information to determine that the merger would not be approved by the Justice Department, Northwest contends that VE's representation provides no basis for disqualification.

The record sharply contradicts Northwest's claim that all of the material supplied by American to VE was publicly available. But Northwest's argument would fail even if it could show that all of the information provided by American was a matter of public knowledge. As we explained above, the substantial relationship test, as set out in our precedents and the Rules, contains no exception for prior representations in which an attorney's advice was based on public information. Accordingly, the question is not whether VE's representation of American in Project Armadillo involved matters of public knowledge but whether the subject matter of the prior representation in substantially related to the present case.

American argues that the primary issue in Project Armadillo, as in this case, was market definition. Not only did VE represent American on this same issue, but VE was also in a position to obtain information regarding American's views on the proper measure of markets, views which Northwest's complaint suggests are relevant to the present case. Northwest recognizes that market definition will be crucial in this case, but argues that

VE's treatment of this issue in Project Armadillo was superficial and limited. While conceding that "[m]ore difficult questions could have been raised had American been interested in a partial acquisition," Northwest contends that the "only issue with which American was concerned was whether it would be challenged if it attempted to acquire all of Continental's operations." According to Northwest, "[t]he answer to American's question was obvious . . . Anyone familiar with American's hub operations in Dallas and Continental's Houston hub operations would realize that American and Continental are major competitors in this region and that their combination would be subject to challenge."

The record demonstrates, however, that the subject matter was far more complex, and VE's analysis far more extensive, than Northwest's account suggests. A VE partner's notes from the first meeting between VE and American indicate that American was interested in a partial acquisition from the very start: "AA would be interested in the entire company but there are certain operations that are particularly important . . . They would be willing to divest some operations." VE's investigation could not have "rested largely" on Continental's strong Houston presence, for when this question was brought up in the first meeting, VE noted that "AA could sell the Houston hub." Thus, sometime after the meeting a VE partner sent a memo to American explaining that he had "spoke[n] at some length" with American's economist and asked that the market share data be rerun on the assumption that American would not acquire Continental's Houston hub. While

Northwest now asserts that VE's advice was based largely on the Houston hub, a VE partner at the time stated in yet another memo that even when Houston is removed from consideration, "substantial problems are created by Continental's other hubs--particularly New York City, Chicago, Cleveland, and Denver," as well as by the "substantial overlaps between Continental and American on flights to Mexico." Northwest's contention that Project Armadillo involved the single question of a complete merger and required study of only a few markets is simply belied by the record.

Similarly, it does not appear that market definition and the Justice Department's opposition to the merger were as "obvious" as Northwest now asserts. Northwest argues that market definition cannot be a common issue between this matter and the present case because unlike in the present case, where market definition will be hotly disputed, the Department of Justice merger guidelines left little room for discussion. A VE lawyer's notes from the first Project Armadillo meeting, however, discloses a different picture:

> [American is] reluctant to take positions in connection with a Continental merger that might be inconsistent with the positions they are taking elsewhere. This issue came up in connection with the discussions of markets. Apparently they have developed a variety of different views about what are relevant markets. (It appears to me that maybe their argument is there are no relevant markets). Evidently the material that they will be sending us discusses relevant markets, discusses the "city pair" analysis and competition among hubs. . . . Appar-

> ently they have taken the position that hubs are not markets . . . .

In addition, Northwest contends that the Department of Justice's merger guidelines made the answer obvious. This is not the position that VE took during the representation, however. Upon receiving a memo prepared by American setting out the difficulties to merger under the city-pair analysis, a VE partner responded that the memo was "only the beginning of the analysis in my view." The VE lawyer then went on to suggest that American might be able to acquire Continental even though the merger might "violate" the guidelines.

We are forced to the conclusion that the question of market definition in Project Armadillo was more complex than Northwest now asserts. VE's representation of American necessarily required a detailed evaluation of American's operations in the various markets that might be deemed relevant. The instant case will involve similar issues.

VE was also privy to American's views of the relevant air transportation markets, a related matter that will also be at issue in the present case. American provided VE with materials reflecting AA's position on antitrust issues in prior merger/acquisition cases. Included in these materials were confidential "white papers" filed by American with the Justice Department.

In support of its claim that markets other than the national market are relevant in the present case, Northwest's complaint asserts that American "has repeatedly urged that O & D markets

and regional airline passenger markets *are* relevant economic markets." Three of the examples cited by Northwest in support of this allegation appear to be taken from public testimony. The fourth is different: "AA argued to the Department of Justice in 1989 that city pair markets to and from O'Hare Airport constitute relevant markets." Northwest does not deny that this statement is contained in the materials obtained by VE from American during Project Armadillo. Nor does Northwest claim that this statement is a matter of public knowledge. Rather, Northwest states that it simply copied Continental's complaint in drafting its own. Since Northwest's complaint did not involve any independent research by VE, the argument seems to run, the allegation cannot possibly be based on confidential information supplied by American. We would first point out that Northwest's explanation remains plausible only so long as the complaint remains the sole document involved in the case. Northwest will eventually have to address the issues, including American's alleged views on the relevant market, on its own. More importantly, the answer given by Northwest is precisely one the substantial relationship test forbids. Once a substantial relationship has been established, former counsel is precluded from attempting to prove that he did not receive confidences. *See, e.g., Corrugated,* 659 F.2d at 1347. Northwest's response here--that VE might have obtained the information, but did not use it--is plainly barred by our precedents.

We appreciate Northwest's concern that an overly broad reading of "subject matter" can leave antitrust counselors with one client per industry--a result with little redemptive value. The nexus here is far more than case one and case two both presenting claims of attempted monopolization. Northwest contends that cases like *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 22 (D.D.C 1984), preclude us from disqualifying VE. But American's showing in this case goes far beyond the same field, same party "points of contact" found insufficient in that case. *See id.* at 40. Rather, American has succeeded in "delineat[ing with specificity the subject matters, issues and causes of action" common to prior and present representations in the manner demanded by our precedents. *Duncan*, 646 F.2d at 1029.

VI

We hold that VE's prior representations of American in substantially related matters require the disqualification of VE in this case. We therefore issue a writ of mandamus directing the district court to vacate its order denying American's motion and enter an order disqualifying VE from representing Northwest.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CONTINENTAL AIRLINES, INC., Plaintiff,	§	
v.	§	C.A. NO. G-92-259
AMERICAN AIRLINES, INC., and AMR CORPORATION, Defendants,	§	
	§	CONSOLIDATED WITH
NORTHWEST AIRLINES, INC., Plaintiffs,	§	
v.	§	C.A. NO. G-92-266
AMERICAN AIRLINES, INC., and AMR CORPORATION, Defendants.	§	

ORDER

Before the Court are the Defendants' and the Plaintiff Northwest Airlines, Inc.'s Motions to Disqualify Counsel. For the reasons set forth below, the Court is of the opinion that both motions should be DENIED.

I.

Defendants argue that Vinson & Elkins should be disqualified as Northwest's counsel on three separate grounds: 1) Vinson & Elkins' prior agreement to represent Defendants in this litigation; 2) Vinson & Elkins' representation of Defendants in other matters; and 3) Vinson & Elkins' receipt of confidential information related to this litigation. The Court has carefully examined the dumbfoundingly voluminous pleadings on file regarding these contentions and finds that each is without sufficient merit to warrant disqualification.

There is some evidence in the record that there was some mixup as to whether Vinson & Elkins would be able to represent Defendants. Similarly, there is some evidence that Vinson & Elkins has represented Defendants in regard other, unrelated matters. And there is some evidence that a confidential memorandum was sent to Vinson & Elkins.

On the other hand, the mixup concerning Vinson & Elkins' availability was brief, and the Court finds, based on the totality of the circumstances, that Vinson & Elkins need not be disqualified. Similarly, Vinson & Elkins has not represented Defendants for quite some time, and the matters that it did handle for Defendants were only tangentially related to this litigation. In this regard, the Court notes that, for instance, in the admiralty bar on the Texas Gulf Coast, it is customary, in the aftermath of a maritime collision, for those firms that represent underwriters to agree to represent the first client that contacts the firm. Thus, in one case

the firm may find itself on the opposite side of an underwriter which was its client in another matter. In the Court's view, this analogy adequately describes the situation here. Finally, although the confidential memorandum was undoubtedly sent to Vinson & Elkins, no one at the firm read the memo, and the Court believes that, on the facts of this case, the mere sending of the memo by Defendants' other counsel is not sufficient to require disqualification. The Court has read the cases cited by Defendants. They are, however, not binding on this Court, and the Court respectfully declines to follow them to the extent that they can be read as mandating disqualification in this case based solely on the receipt of an unread memo, regardless of other factors. Moreover, any information actually received by Vinson & Elkins was not sufficient to cause any material prejudice to Defendants in this litigation. Based on the Court's perception of the totality of the circumstances, the Court concludes that Defendants' motion should be DENIED.[1]

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[1] In this regard, the Court notes with pleasure its receipt of the affidavit of Dean John F. Sutton, Jr., a gentleman personally known to this Court to be of the highest moral character and integrity, as well as an acknowledged expert in the fields of professional responsibility and attorney conduct. Although the Court did not rely on Dean Sutton's affidavit in reaching any of its conclusions, the Court certainly agrees with Dean Sutton that "the concept of `taint' of a trial involves a balancing of various interests and goals of the lawyers and the parties to the litigation. Among these interests are the interests not only of [the] movant not to be prejudiced . . . but the affirmative interest of a litigant in being represented by counsel of his choice and the interest of the public in courts' business not being hampered by tactical maneuvering with disqualification motions." In ruling on these motions, the Court has

II.

The Court has also considered the submissions regarding Northwest's Motion to Disqualify Weil, Gotshal & Manges. Although this motion appears to have more merit than Defendants' Motion to Disqualify, the Court finds, in the totality of circumstances, that it has not been sufficiently shown that Weil, Gotshal & Manges must be disqualified from representing Defendants.[2]

III.

Implicit in any Motion to Disqualify is the notion that counsel may use confidential information it has obtained for some improper purpose. The Court is well and personally acquainted with most, if not all, counsel associated with this litigation, and

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been guided by similar notions of the appropriate standards by which to judge disqualification motions.

[2] The Court hastens to point out that although it treats both Motions to Disqualify in summary fashion in this Order, the Court has gone to great lengths to study all the pleadings and has reached its decision "'"only after painstaking analysis of the facts and precise application of precedent."'" *Duncan v. Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020, 1029 (5th Cir. Unit B June 1981) (quoting *Brennan's Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 173-74 (5th Cir. 1979) (quoting *United States v. Standard Oil Co.*, 136 F.Supp. 345, 367 (S.D.N.Y. 1955))). In most cases, the Court goes to some lengths to explain its reasoning process for the benefit of the parties. In this case, as explained more fully below, the Court is convinced, based on the submissions, that these motions were filed primarily for tactical reasons. Therefore, although the Court has considered all the materials offered and has engaged in substantial deliberations, it has taken the liberty of reducing its explanation to a more summary form.

the Court believes that, given the intelligence and creativity of counsel, the size and resources of the law firms involved, and the nature of the events and transactions complained of, the parties can, through the use of "Chinese walls" and other measures, take mutually agreeable steps to ensure that no impropriety or appearance of impropriety improperly taints this litigation.

IV.

More to the point, the Court is disturbed by the course this litigation is taking, even now in its earliest stages. First, the Defendants' Motion to Disqualify Counsel and related Replies and supporting materials are some of the most condescending pleadings that have ever been presented to this Court. Defendants repeatedly state that the rule the Court "must apply" is clear, but imply that this Court lacks the intelligence to determine and apply the correct rule. However, although Defendants cite some Fifth Circuit case law to support general propositions, the bulk of the authority relied on by Defendants to support their position consists of nonbinding decisions dealing with substantially different fact patterns.

Even more disturbing is the sheer tonnage of pleadings and supporting materials that have been filed regarding these motions. The Court has instructed the Deputy Clerk to weigh and measure these materials, and the Clerk reports that the filings, *on the disqualification issue alone,* form a stack approximately 45 inches high and weighing 117 pounds. *In the Court's view, rarely has a court been presented with a more blatant example of the use of disqualifi-*

cation motions for tactical purposes. The Court considers the parties' conduct in filing these pleadings to be a gross abuse of the resources of this Court. Obviously the Court cannot entertain such filings on every motion that is filed in this case, or in any case. Otherwise the Court's entire docket would grind to a halt. More importantly, the Court has no intention of allowing this litigation to degenerate into a paper war continuing, like some Dickensian nightmare, until the parties can no longer afford to pay counsel fees.

The attorneys in this case are among the brightest and most talented of any bar in this country, many having achieved national and even international celebrity and professional acclaim. At least two are former distinguished members of the federal judiciary. Counsel should therefore be especially aware of the crushing caseload carried by this Court and the preposterous imposition pleadings of this magnitude create on the Court's limited and severely burdened resources. The Court, the parties, and the federal civil justice system deserve better, and this Court demands better. In *all* further pleadings in this proceeding, the parties and their counsel are instructed that "less is more," and that brevity is not only a practical aspiration but an absolute necessity.

V.

Therefore, it is hereby ORDERED, ADJUDGED, and DECREED that Defendants' Motion to Disqualify Counsel is DENIED.

It is further ORDERED that Plaintiff Northwest Airlines, Inc.'s Motion to Disqualify Counsel is hereby DENIED.

It is further ORDERED that at the August 4, 1992 status conference, the parties will present to the Court a brief and concise *agreed upon* plan for preventing any conflicts of interest through the use of "Chinese walls" and the like. This plan will be jointly presented in the form of a Proposed Order which can be signed and entered by the Court at that time, and it will be both fair to and binding on all parties.

It is further ORDERED that the parties *file no further pleadings in this Court relating to either Motion to Disqualify.*

It is further ORDERED that the parities *FILE NO FURTHER MOTIONS OF ANY KIND WHATSOEVER WITHOUT EXPRESS LEAVE OF THE COURT. NOR WILL THE PARTIES FILE A MOTION FOR LEAVE TO FILE A MOTION WITH THE PROPOSED MOTION ATTACHED.*

It is further ORDERED that to the extent the Court expressly allows the parties to file any other motions, *SUCH MOTION SHALL BE LIMITED TO FIFTEEN PAGES IN LENGTH, INCLUDING BRIEFS AND OTHER SUPPORTING MATERIALS. THERE WILL BE NO EXCEPTIONS TO THIS RULE.* At the August 4, 1992 status conference, the Court will set out additional instructions regarding pleadings and discovery. The Court will also set a trial date and firm docket controls.

It is further ORDERED that any violation of the above Orders will be severely sanctioned.

IT IS SO ORDERED.

DONE at Galveston, Texas this 24th day of July, 1992.

/s/ Samuel B. Kent
Samuel B. Kent
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7493

**IN RE: AMERICAN AIRLINES, INC.
and AMR CORPORATION,**

Petitioners.

Appeal from the United States District Court for the
Southern District of Texas

**ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC**

(Opinion 9/4/92, 5 Cir., 1992, ____ F.2d ___)

(September 29, 1992)

Before POLITZ, Chief Judge, Judges HIGGINBOTHAM and BARKSDALE, Circuit Judges.

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

REHG-6

Supreme Court, U.S.
FILED
JAN 22 1993
OFFICE OF THE CLERK

No. 92-945

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

NORTHWEST AIRLINES, INC.,
Petitioner,
v.
AMERICAN AIRLINES, INC. and
AMR CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

1. Whether a court of appeals may issue a writ of mandamus to correct a district court's denial of a motion to disqualify counsel, when there is no adequate alternative means of effective relief and the right to relief is clear and indisputable.

2. Whether a court of appeals may review the record on mandamus to determine that, on the undisputed facts, the applicable legal and ethical principles require disqualification.

3. Whether the Court of Appeals correctly applied the substantial relationship rule in this case to reverse the District Court's denial of disqualifiation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-945

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

AMERICAN AIRLINES, INC. and
AMR CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

RULES INVOLVED

The local rules of the United States District Court for the Southern District of Texas provide in part as follows:

> The Code of Professional Responsibility adopted by this court is the Code of Professional Responsibility of the State Bar of Texas, as amended from time to time.

S.D. Tex. R. 4B.

The Texas Disciplinary Rules of Professional Conduct, adopted effective January 1, 1990, as amended October 23, 1991, provide in part as follows:

Rule 1.09—Conflict of Interest: Former Client

> (a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
>
> * * * * *
>
> (2) If the representation in reasonable probability will involve a violation of Rule 1.05; [1] or
>
> (3) If it is the same or a substantially related matter.

STATEMENT OF THE CASE

Last June, in an action filed in the Southern District of Texas, petitioner Northwest Airlines, Inc. (hereafter "Northwest") charged respondent American Airlines, Inc. and its parent, respondent AMR Corporation (hereafter collectively "American"), with using predatory pricing to monopolize the national and numerous local and regional markets for airline passenger service, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The complaint for treble damages alleged that American's conduct will cause major domestic airlines, including Northwest, to lose more than $3.5 billion in annual revenues—$500 million during summer 1992 alone. R-1 ¶¶ 32, 36. Northwest's complaint was consolidated with a virtually identical complaint against American that had been filed a few days earlier by Continental Airlines, Inc. Pet. App. A-2.

Vinson & Elkins (hereafter "VE") was counsel of record for Northwest. Because VE had represented American in connection with several significant antitrust matters in the recent past and had also agreed to

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[1] Rule 1.05 prohibits a lawyer from revealing a client's confidential information, except in certain specified circumstances not pertinent to this case.

represent American in the instant case, American promptly moved to disqualify VE from representing Northwest. Pet. App. A-2 to A-3.

The District Court denied the motion in a brief opinion containing virtually no analysis. Pet. App. B-1 to B-8. It ruled "in summary fashion," *id.* at B-4 n.2, that the "mixup" concerning VE's availability to represent American in this case was brief and that the matters on which VE had previously represented American were only "tangentially related to this litigation." *Id.* at B-2.

American sought immediate mandamus review and, in a detailed and exhaustive opinion by Judge Higginbotham, the Fifth Circuit granted the writ. Pet. App. A.

The Circuit Court recognized that orders denying motions to disqualify counsel are not appealable as of course under 28 U.S.C. § 1291, citing *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), and *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), but also noted that "a writ of mandamus might be available 'in the exceptional circumstances for which it was designed.'" Pet. App. A-4, quoting *Risjord*, 449 U.S. at 378-79 n.13, and *Richardson-Merrell*, 472 U.S. at 435. The court therefore required American to show that it could not otherwise obtain the relief it sought and that its right to issuance of the writ was clear and indisputable. Pet. App. A-4 to A-5, citing, *inter alia*, *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 309 (1989).[2]

The court determined that "the special circumstances of the present dispute [are] sufficient to place it within the narrow class of cases warranting mandamus review." Pet. App. A-5 to A-6. It ruled that American would suffer

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[2] Accordingly, the court recognized that American would be unable to obtain mandamus if it were challenging only matters that were committed to the District Court's discretion. Pet. App. A-6 to A-7, citing *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (*per curiam*).

"irreparable harm" in the absence of immediate review, and also observed that the parties' arguments presented critical issues concerning the proper interpretation and application of ethical standards on disqualification motions that had importance beyond this immediate lawsuit and on which the Texas bar needed guidance. *Id.*[3]

The Court of Appeals reviewed the record to determine whether American had shown that its right to relief was "clear and indisputable." It ruled, on the undisputed facts and applicable principles of law, that disqualification of VE was required, since VE had previously represented American in several separate matters, at least three of which were antitrust ones "substantially related" to this case. Pet. App. A-37 to A-56. It added that VE's continuing representation would taint the proceedings. As the court stated,

> We believe that disqualification of VE would be appropriate even under the relaxed "actual prejudice" or "taint" standard Northwest urges this court to adopt. . . . [T]he relationship between the matters in which VE has represented American and the instant litigation is so intimate that VE's continued involvement does threaten to compromise the integrity of the present trial.

Id. at A-33. The court emphasized that "VE was privy to many of American's secrets." *Id.* at A-35.

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[3] These included questions about the interplay between local disciplinary rules and federal case law on disqualification motions and whether the newly promulgated Texas Disciplinary Rules altered the traditional "substantial relationship" rule (concerning representations adverse to a former client) that had long been used by the Fifth Circuit and other federal courts. Pet. App. A-8 to A-10, A-19 to A-37. *See* n.9, *infra*. The court held that, while the Texas Disciplinary Rules are a source of governing ethical standards, the decision whether to disqualify counsel in federal court is governed by federal law. Pet. App. A-9 to A-10. Further, the court concluded that the Texas Disciplinary Rules did not change the traditional substantial relationship rule developed in the case law. *Id.* at A-28, A-36 to A-37.

The court carefully avoided resolving any conflicts of evidence, declining for that reason to rule on American's claim that VE should be disqualified for switching sides in this case. Pet. App. A-13 to A-18. The Fifth Circuit questioned no finding of fact by the District Court, only that court's ruling that the matters VE had previously handled for American "were only tangentially related to this litigation." Pet. App. B-2.

The court observed that VE had "represented American in several matters in recent years, earning fees in excess of $676,000[,]" Pet. App. A-37, and analyzed three of these in detail.

1. Fort Bend Litigation.

VE defended American in a state court action (hereafter "Fort Bend" case), in which Continental Airlines, Inc. asserted state law claims previously dismissed in *In re Air Passenger Computer Reservations Sys. Antitrust Litig.*, 694 F. Supp. 1443 (C.D. Cal. 1988), *aff'd sub nom. Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992) (hereafter "California CRS" case). The court noted Northwest's concession that the California CRS case—in which Continental and Northwest had both sued American—was substantially related to the instant case. Pet. App. A-38. Concluding that the Fort Bend case was substantially related to the California CRS case, *id.* at A-43, and was therefore also substantially related to this case, the appellate court observed:

> [A] VE partner stated at the time that the California and Fort Bend suits "involve the same parties, the same alleged acts, and the same alleged damages." Another VE lawyer noted that the two suits could be seen as "largely identical[.]"

Pet. App. A-40 to A-41.

As in this case and the California CRS case, the plaintiff in the Fort Bend case charged American with ex-

cluding other carriers from " 'certain air passenger markets.' " Pet. App. A-40. Perhaps most significantly for purposes of the substantial relationship analysis,

> Continental noted that the California district court had cited American President Robert Crandall's alleged 1982 price-fixing solicitation of Braniff as "a textbook example of anticompetitive conduct" in ruling that "Continental could proceed to trial on its claim that American illegally attempted to monopolize the Dallas-Fort Worth airport."

Id. As the Circuit Court observed, Continental's market exclusion allegations and the reference to the alleged price-fixing solicitation led to a strategy meeting between VE and Gibson, Dunn & Crutcher (counsel of record for American in the California CRS case), during which, according to the contemporaneous notes of a VE lawyer, VE participated in developing arguments for excluding the alleged price-fixing solicitation from the Fort Bend case. *Id.* at A-40 to A-42. As the Circuit Court stressed, Northwest's complaint in this case "prominently cites" the very price-fixing solicitation allegation that VE lawyers "were charged with excluding in the Fort Bend case." Pet. App. A-42. *See* R-1 ¶¶ 25, 26. Moreover, Northwest's complaint "prominently featured" Dallas-Fort Worth as an "illustrative example" of the markets American has supposedly monopolized or attempted to monopolize. Pet. App. A-42. *See* R-1 ¶¶ 18-20.

2. System One Case.

VE also defended American in a Houston federal court action (hereafter "System One" case), in which a Continental Airlines affiliate charged American with violating the antitrust laws through a series of exclusionary acts. The plaintiff alleged that American's goal was not only to reap monopoly profits from the sale and use of CRS systems but also to enhance profits from providing air transportation services. Pet. App. A-43. The Circuit Court analyzed in detail the relationship between the

subject matter of the System One case and this case, and noted a substantial overlap both in the overall thrust of the two cases and in specific issues, such as barriers to entry. *Id.* at A-44 to A-48.

Furthermore, as the Fifth Circuit emphasized, VE did not deny that in the course of the System One representation, one of its lawyers had "personally reviewed [internal American] documents relating to marketing strategy and air transportation issues[,]" Pet. App. A-47, matters that are directly at issue in this case.

3. Project Armadillo.

VE also served as antitrust counsellor to American in a proposed acquisition of Continental Airlines, "Project Armadillo." Pet. App. A-49. VE advised American on the likelihood of challenge under the Department of Justice's merger guidelines. *Id.*

As the court below noted, the principal focus was on whether American had "market power" in the relevant markets. The central issue was whether the relevant market was a national one or rather smaller ones involving city pairs and regions. Pet. App. A-49. The court observed that "[t]hese same issues are at the heart of the present case[,]" *id.*, adding that "Northwest recognizes that market definition will be crucial in this case." *Id.* at A-51.[4]

Although the substantial relationship determination was sufficient, without more, to warrant disqualification, Pet. App. A-51, the court added that

> VE was also privy to American's views of the relevant air transportation markets, a related matter that

[4] In the Fifth Circuit, Northwest suggested that VE's analysis of market definition in Project Armadillo was "superficial and limited." Pet. App. A-51 to A-52. The court rejected this transparent attempt to sidestep the substantial relationship issue, noting that "the subject was far more complex, and VE's analysis far more extensive, than Northwest's account suggests." *Id.* at A-52.

> will also be at issue in the present case. American provided VE with materials reflecting AA's position on antitrust issues in prior merger/acquisition cases. Included in these materials were confidential "white papers" filed by American with the Justice Department.

Id. at A-54.

The Circuit Court concluded that "American has succeeded in 'delineat[ing] with specificity the subject matters, issues and causes of action' common to prior and present representations in the manner demanded by our precedents." Pet. App. A-56. Indeed, the court held that disqualification would have been required even under the "taint" standard that Northwest urged upon the Circuit Court. *Id.* at A-33.[5] Accordingly, the court issued the writ.

ARGUMENT

THE DECISION OF THE CIRCUIT COURT WAS CORRECT, CONFLICTS WITH NO DECISION OF THIS COURT OR ANY COURT OF APPEALS, AND DOES NOT WARRANT THIS COURT'S REVIEW.

A. Mandamus is Available in the Exceptional Case to Reverse a District Court's Denial of a Motion to Disqualify Counsel.

The appellate court's decision to grant mandamus was clearly correct and conflicts with no decision of this Court or any court of appeals. When this Court held that the denial of an attorney disqualification motion is not immediately appealable under 28 U.S.C. § 1291, it also recognized the possibility of a writ of mandamus:

> Although there may be situations in which a party will be irreparably damaged if forced to wait until final resolution of the underlying litigation before securing review of an order denying its motion to

[5] *See* n.13, *infra*, explaining Northwest's distortion of the so-called "taint" standard.

> disqualify opposing counsel, it is not necessary, in order to resolve those situations, to create a general rule permitting the appeal of all such orders. . . . Ultimately, if dissatisfied with the result in the District Court and absolutely determined that it will be harmed irreparably, a party may seek to have the question certified for interlocutory appellate review pursuant to 28 U.S.C. § 1292(b), see n.7, *supra*, and, in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals might be available.

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 378-79 n.13 (1981). The availability of mandamus was underscored in *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), in which this Court held that a decision granting disqualification was also not immediately appealable. The Court stated that the inability to pursue an interlocutory appeal under 28 U.S.C. § 1291 "would not necessarily leave the client or the disqualified attorney without a remedy." quoting the *Risjord* footnote. *Id.* at 435.

In keeping with *Risjord* and *Richardson-Merrell*, every court of appeals that has faced a mandamus petition seeking reversal of a disqualification motion ruling has recognized the availability of mandamus, although reserving it for the truly unusual case. This case is one of only five reported decisions in the decade since *Risjord* in which a ruling on a disqualification motion has been corrected by mandamus. *See In re Sandahl*, No. 92-3129, 1992 U.S. LEXIS 31574 (7th Cir. Dec. 2, 1992); *In re Dresser Indus., Inc.*, 972 F.2d 540 (5th Cir. 1992); *Christensen v. United States Dist. Court for the Cent. Dist. of Cal.*, 844 F.2d 694 (9th Cir. 1988); *In re American Cable Publications, Inc.*, 768 F.2d 1194 (10th Cir. 1985).[6]

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[6] Courts of appeals declining to grant mandamus have done so, not because mandamus is never available to reverse rulings on disqualification motions, but because mandamus was not appropriate

The Circuit Court, fully cognizant of the applicable mandamus standards, ruled that "the special circumstances of the present dispute [are] sufficient to place it within that narrow class of cases warranting mandamus review." Pet. App. A-5 to A-6. By no means did the court "undercut" this Court's decisions and "open[] the door to interlocutory review of orders on attorney-disqualification motions virtually on demand." Pet. at 11.

Northwest asserts that the Fifth Circuit "concluded, without any analysis, that American has no adequate alternative means to obtain the relief sought on the grounds that 'the nature and size of this litigation would *seem* to preclude effective review upon final judgment.'" Pet. at 9 (emphasis added by Northwest). But it is clear that the determination of irreparable harm was not reached, as if in a vacuum, on size and complexity alone.[7] The very nature of VE's ethical violation was such that irreparable harm was unavoidable but for mandamus. As the court ruled, the relationship between the several matters in which VE represented American and the instant case was more than "substantial"; it was "intimate." Pet. App. A-33. Moreover, VE's ethical violation in undertaking to represent Northwest in this case was not merely technical.

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in the particular cases. *See, e.g., Lunde v. Helms*, 898 F.2d 1343, 1345 (8th Cir.), *cert. denied*, 111 S. Ct. 249 (1990); *In re Mechem*, 880 F.2d 872, 874-75 (6th Cir. 1989); *In re Bushkin Assocs., Inc.*, 864 F.2d 241, 244-47 (1st Cir. 1989); *In re Ford Motor Co.*, 751 F.2d 274, 276-77 (8th Cir. 1984). *See also Community Broadcasting v. F.C.C.*, 546 F.2d 1022, 1028 (D.C. Cir. 1976).

[7] To be sure, this Court has held in the collateral order context that the mere possibility that a party may incur additional litigation expense is not a sufficient basis for setting aside the finality requirement imposed by Congress. *Richardson-Merrell*, 472 U.S. at 436. This Court has also held, however, that the potential for substantial cost savings can be a relevant factor in determining whether to issue mandamus. *See Ex parte Skinner & Eddy Corp.*, 265 U.S. 86, 96 (1924) (noting that a "useless waste of time and effort" would result if mandamus were not granted).

It was egregious in ways that would have incurably tainted the proceedings. *Id.* at A-6, A-33.

The record shows that in each of three prior representations VE accessed and used a great amount of American's confidential information and litigation strategies. Pet. App. A-33, A-35. *See* pp. 5-8, *supra*. Most egregious of all, VE had participated in privileged strategy sessions about how to exclude the same inflammatory evidence that it highlighted in Northwest's complaint in this case. Inevitably, VE's foreknowledge of American's confidential information and legal strategies would have influenced its interrogation of American's officers and employees, both in depositions and at trial. How could VE have expurged this forbidden knowledge from its consciousness and proceed as if it did not know it? Not only was American being sued by the same law firm that had previously represented it, it was under attack by the very same *individuals* who had represented it and in whom it had confided in the prior, substantially related matters.[8]

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[8] All of the VE lawyers listed as counsel on Northwest's complaint (R-1-19) had worked on one or more of the related prior matters for American. *See* R-4-12 (American's Memorandum of Law in Support of its Motion to Disqualify Northwest's Counsel); R-6 ¶ 14 (*In Camera* Affidavit of Andrew B. Steinberg). For example, Harry Reasoner—VE's lead counsel for Northwest in this case—had himself signed American's answer in the Fort Bend case. R-6 ¶ 15, and Ex. 4(A) thereto, p. 6. In addition, both Reasoner and John Murchison signed nondisclosure agreements to obtain access to highly secret and proprietary information in order to be able to serve as American's antitrust counsel on Project Armadillo, the proposed Continental merger. R-6 ¶ 31, and Exs. 16, 17 thereto. The nature of their work is illustrated by a detailed memorandum from Murchison to Reasoner summarizing conversations with American's in-house counsel, including its General Counsel, on antitrust matters related to the proposed merger. See R-20 ¶ 19a (Supplemental *In Camera* Affidavit of Andrew B. Steinberg), and Ex. 18a thereto.

Accordingly, the District Court's suggestion that VE use a "Chinese wall" to screen certain individuals from this case was inapposite on these facts, in addition to being inconsistent with

American's showing to the Circuit Court therefore went well beyond the mere "hint" of "indelible stamp or taint" that this Court ruled was insufficient to show irreparable harm in *Risjord*, 449 U.S. at 376. American showed that absent mandamus there would be substantial taint that could not be cured by a reversal following final judgment. Even were all of the discovery and trial in this complex and disruptive case repeated by new counsel for Northwest who would be denied access to any of the prior record, by what practical means could Northwest's own witnesses' and in-house counsel's familiarity with their prior testimony and the prior record be purged? It would have been impossible to restore American to its rightful position had VE's ethical violation and participation in the case not been immediately terminated by mandamus. To be sure, the erroneous denial of a disqualification motion rarely results in irreparable harm before final judgment. Nonetheless, given the particulars of the ethical violation here, mandamus was the only effective remedy.

Northwest criticizes the Circuit Court for supporting its decision to issue mandamus with the observation "that this case raised important questions pertaining to the proper interpretation and application of ethical standards in disqualification cases." Pet. at 9. Although Northwest recognizes that this Court "has indicated that mandamus may be warranted when a case presents an important and novel issue of first impression," Pet. at 9, *see Schlagenhauf v. Holder*, 379 U.S. 104, 110-11 (1964), it contends that this case presented no such novel issue. Northwest itself argued to the two lower courts, however, that the newly promulgated Texas Disciplinary Rules changed the traditional "substantial relationship" rule that had long been applied in the Fifth Circuit and other federal courts. *See* n.3 *supra*. Indeed, Northwest's arguments concern-

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Texas law, which forbids such arrangements. *See, e.g.*, Texas Disciplinary Rule 1.09(b); *Petroleum Wholesale, Inc. v. Marshall*, 751 S.W. 2d 295, 300 (Tex. Ct. App. 1988).

ing the new Rules doubtless led the Circuit Court to agree that attorneys throughout Texas "need the benefit of this Court's guidance." Pet. App. A-6. It is in part because the court reaffirmed and applied the traditional substantial relationship rule, however, that there is no occasion for this Court's review.[9]

B. A Court of Appeals May Review the Record on Mandamus to Determine That the Undisputed Facts and Applicable Legal Principles Require Disqualification.

Northwest argues that this Court should grant certiorari because the Circuit Court improperly reviewed disputed fact issues *de novo*. Pet. at 15. However, Northwest points to not a single disputed issue of fact resolved by the Court of Appeals.[10] The court reviewed the applicable

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[9] The substantial relationship rule enjoys wide currency among the federal courts. *See, e.g., National Souvenir Ctr. v. Historic Figures, Inc.*, 728 F.2d 503, 517-18 (D.C. Cir.), *cert. denied*, 469 U.S. 825 (1984); *Kevlik v. Goldstein*, 724 F.2d 844, 850-51 (1st Cir. 1984); *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 570 (2d Cir. 1973); *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382, 1385 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *General Elec. Co. v. Valeron Corp.*, 608 F.2d 265, 267 (6th Cir. 1979), *cert. denied*, 445 U.S. 930 (1980); *First Wis. Mortgage Trust v. First Wis. Corp.*, 584 F.2d 201, 213-14 (7th Cir. 1978) (*en banc*); *Arkansas v. Dean Foods Prods. Co.*, 605 F.2d 380, 383-84 (8th Cir. 1979), *overruled on other grounds by In re Multi-Piece Rim Prods. Liab. Litig.*, 612 F.2d 377 (8th Cir. 1980) (*en banc*), *vacated on other grounds sub nom. Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981); *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir. 1980); *Redd v. Shell Oil Co.*, 518 F.2d 311, 315 (10th Cir. 1975); *Cox v. American Cast Iron Pipe Co.*, 847 F.2d 725, 728 (11th Cir. 1988); *Tessier v. Plastic Surgery Specialists, Inc.*, 731 F. Supp. 724, 730 (E.D. Va. 1990).

[10] Rather, the court assiduously avoided resolving any contested underlying factual issues. Thus, the court carefully reviewed the record regarding American's contention that VE should be disqualified for having switched sides in the instant case, concluding that the record presented an unresolved fact issue as to which the District Court made no findings. It therefore declined to rest its decision to disqualify on that basis. It held, however, that there

legal principles *de novo* and disagreed with the District Court's insupportable ruling that the prior matters in which VE had represented American "were only tangentially related to this litigation." Pet. App. at B-2.

It is neither unusual nor controversial for an appellate court to reverse a trial court's judgment, applying appropriate legal and ethical principles to undisputed facts. *See, e.g., In re Sandahl*, No. 92-3129, 1992 U.S. App. LEXIS 31574, at *10 (7th Cir. Dec. 2, 1992) (issuing mandamus to reverse disqualification order, and rejecting argument that counsel knew things from a prior representation giving it an unfair advantage, stating that "[t]here is no evidence of such an abuse, however, nor is the suggestion of one plausible in the circumstances"); *In re Dresser Indus., Inc.*, 972 F.2d 540, 541 (5th Cir. 1992) (issuing mandamus to reverse denial of disqualification motion, noting "[t]he material facts are undisputed").

Nor is there merit in Northwest's suggestion that the Fifth Circuit's decision conflicts with those of other courts of appeals because the court did not use an abuse of discretion standard in reviewing the substantial relationship determination. Pet. at 15-16. We have found no case, and Northwest cites none, in which a court determined that the substantial relationship rule was violated but yet did not disqualify counsel. Notwithstanding any "abuse of discretion" language in the opinions, the application of the substantial relationship rule has not been treated as a discretionary matter. As the Circuit Court stated, Pet. App. A-7, what the courts of appeals actually do is review findings of underlying fact under the clearly erroneous standard, conduct plenary review with respect to the governing legal principles and their application, but defer to the trial court's discretion in making such

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was no need to remand for fact finding because of its determination that it was obliged to disqualify VE on other grounds. Pet. App. A-13 to A-18.

judgment calls as whether counsel can adequately represent the arguably conflicting interests of two different clients. *See, e.g., Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1351 (9th Cir. 1981); *Brennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 171 & n.3 (5th Cir. 1979). *See also American Roller Co. v. Budinger*, 513 F.2d 982, 935 n.3 (3d Cir. 1975).[11]

C. The Court of Appeals Correctly Applied the Substantial Relationship Rule to Disqualify Counsel on the Facts of this Case.

The Circuit Court properly disqualified VE from representing Northwest against American only after it analyzed three instances in which VE had previously represented American—any one of which would have been a sufficient basis for disqualification—and determined that American would be irreparably harmed absent immediate relief. *See* pp. 3-8, *supra*. This fact-bound ruling does not warrant this Court's review.

Northwest attempts to magnify the significance of this case by contending that it presents the question whether the Fifth Circuit appropriately created a new and unworkable duty of loyalty to former clients as the federal standard for disqualification in former-client cases, in conflict with other decisions in the federal courts. Pet. at 22-27. The case presents no such question. The Circuit Court commented on the duty of loyalty, not as an independent basis for disqualification, but rather as part of the court's analysis of the development of the substantial relationship test. Thus, the Fifth Circuit stated:

> The [Texas Disciplinary] Rules' express establishment of loyalty and confidentiality as the interests

[11] Even when an appellate court purports to apply an abuse of discretion standard in reviewing a substantial relationship determination, its role appears to be the same as described by the Fifth Circuit. *See, e.g., Gas-A-Tron v. Union Oil Co.*, 534 F.2d 1322, 1325 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976).

protected by the substantial relationship test is a return to *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953), where the court held that once it is established that the two representations are substantially related,

> [t]he court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. *Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.*

Pet. App. A-29 (emphasis added by the Fifth Circuit). This acknowledgment that the substantial relationship rule incorporates an element of loyalty is nothing new. *See, e.g., Brennan's Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 172 (5th Cir. 1979) ("A client would feel wronged if an opponent prevailed against him with the aid of an attorney who formerly represented the client in the same matter.").[12]

The principal basis of the substantial relationship disqualification rule is as a prophylactic measure to prevent disclosure of client confidences. As Judge Weinfeld explained in his landmark opinion, *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. at 268-69, courts *presume* that relevant confidences were disclosed to the attorney during the course of a former, substantially related representation. As he reasoned:

> To compel the client to show, in addition to establishing that the subject of the present adverse repre-

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[12] Even one of petitioner's counsel recognizes that the substantial relationship rule is founded in part upon principles of loyalty. *See* Charles W. Wolfram, *Modern Legal Ethics* 368 (1986):

> Although *T.C. Theatre* and the cases that have followed it primarily stress [in discussing the substantial relationship rule] the objective of protecting the confidential information of the former client, the loyalty principle . . . is not without significance as well . . . .

> sentation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the Court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule.

Id. at 269. This reasoning has been widely accepted. *See, e.g., Kevlik v. Goldstein*, 724 F.2d 844, 850-51 (1st Cir. 1984); *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1266-67 (7th Cir. 1983); *Trone v. Smith*, 621 F.2d 994, 998-99 (9th Cir. 1980); *Arkansas v. Dean Foods Prods. Co.*, 605 F.2d 380, 383-84 (8th Cir. 1979); *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973).[13]

In sum, the Fifth Circuit created no new duty of loyalty and no new rule of disqualification. Rather, it simply applied the long-standing substantial relationship test to a particularly flagrant set of undisputed facts to grant mandamus relief in this complex antitrust case, a matter that does not warrant this Court's review.

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[13] Contrary to the position taken by Northwest, Pet. at 25, the Second Circuit and other courts do not demand some separate showing of "taint" in addition to a violation of the substantial relationship rule as a prerequisite for disqualification. On the contrary, a violation of the substantial relationship rule is by itself held to "taint" the proceedings, because "the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation, for exampie, in violation of Canons 4 and 9 [of the now superseded Code of Professional Responsibility], thus giving his present client an unfair advantage. . . ." *Cheng v. GAF Corp.*, 631 F.2d 1052, 1056 n.4 (2d Cir. 1980), *vacated on other grounds*, 450 U.S. 903 (1981), quoting *Armstrong v. McAlpin*, 625 F.2d 433, 444 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1981), quoting *Board of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1992

NORTHWEST AIRLINES, INC.,
Petitioner

v.

AMERICAN AIRLINES AND
AMR CORPORATION,
Respondents

**Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit**

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RULE 29.1 LISTING

Petitoner's Rule 29.1 listing is contained in its Petition for Writ of Certiorari at p. ii n.1.

NO. 92-945

IN THE
Supreme Court of The United States
OCTOBER TERM, 1992

NORTHWEST AIRLINES, INC.,
Petitioner
v.
AMERICAN AIRLINES AND
AMR CORPORATION,
Respondents

Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

The fundamental premise of American's brief in opposition is that there is no conflict between this case and decisions of this Court or any other court of appeals. Brief in Opp. at 8. The premise is demonstrably false. First, the conflict in the circuits on the appropriate standard for granting mandamus in attorney- disqualification cases is demonstrated beyond argument in Judge Posner's recent opinion, *In re Sandahl*, No. 92-3129, 1992 U.S. App. LEXIS 31574 (7th Cir. Dec. 2, 1992). Judge Posner specifically identifies this case as one in which appropriate mandamus standards were not met. Second, the Fifth Circuit's holding that a trial court has no discretion in ruling on attorney disqualification is in conflict with

other circuits. Third, the Fifth Circuit acknowledged that the substantial-relationship test it applied in this case was in conflict with that of the Second Circuit. Pet. App. A at A-10 to A-11. The new duty-of-loyalty test the Fifth Circuit has created is unique and in conflict with all other circuits.

American asserts that the facts were undisputed, and then devotes much of its opposition to giving its partisan version of highly disputed facts in an effort to create the impression that disqualification was justified. The record clearly establishes that the district court resolved critical factual issues in favor of Northwest, and that the Fifth Circuit improperly substituted its own fact findings for those of the district court that it repudiated.

The Fifth Circuit decision has created a situation in which disqualification in federal courts will turn on venue. Prior to suit being filed in a particular circuit, a law firm will not be able to determine whether it would be disqualified. The conflict in ethical standards combined with a new mandamus standard of review that is equivalent to an interlocutory appeal calls for resolution of these issues by this Court.

I
THE DECISION OF THE FIFTH CIRCUIT FUNDAMENTALLY CONFLICTS WITH THIS COURT'S MANDAMUS STANDARDS AND WITH THE DECISIONS OF OTHER CIRCUITS

In re Sandahl, No. 92-3129, 1992 U.S. App. LEXIS 31574 (7th Cir. Dec. 2, 1992), which American cites but does not discuss, illuminates and deepens the extent to which this case conflicts both with this Court's decisions on mandamus and with mandamus decisions involving attorney-disqualification orders from other

circuits.[1]

The issue in *Sandahl* was the availability of mandamus jurisdiction to review a trial-court order granting disqualification. In this opinion, which was not available at the time Northwest filed its Petition for Writ of Certiorari, the Seventh Circuit analyzed the problem of defining mandamus jurisdiction in attorney-disqualification cases in the wake of this Court's decisions in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981) and *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985). The court noted that two views of mandamus jurisdiction have emerged in disqualification cases: the broad view is epitomized by the decisions of the Fifth Circuit in this case and in *In re Dresser Industries, Inc.*, 972 F.2d 540 (5th Cir. 1992) and by the Ninth Circuit in *Christensen v. United States District Court*, 844 F.2d 694 (9th Cir. 1988); the narrow view is epitomized by decisions of the First, Sixth, and Tenth Circuits. *Sandahl* at *8-*9. The Seventh Circuit adopted the narrow view and granted the writ on the facts of the case.

In the opinion, Judge Posner discussed the apparent contradiction presented in *Richardson-Merrell*, in which this Court held that orders granting disqualification do not impose the type of irreparable harm necessary for collateral orders, while at the same time implying that such orders may constitute sufficient irreparable

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[1] American's comment that the present case is one of only five reported decisions since *Firestone Tire & Rubber Co. v. Risjord* in which a ruling on a disqualification order has been corrected by mandamus, Brief in Opp. at 9, misses the point. The concern for this Court is the sheer number of times this issue has arisen and the confusion in standards created by the conflicting approaches of the circuits. *See* Pet. at 11-13 and n.5.

harm for mandamus review. *Sandahl* at *1-*9. The court recognized, however, that it is the differences between collateral-order appeals and mandamus that may justify the difference in the requirement of showing harm: whereas an appeal of a collateral order is effectively a matter of right and is subject to the same standard of review as an appeal of a final judgment, review by mandamus is discretionary and the standard of review is narrower than in an ordinary appeal. *Id.* at *4-*6. The court criticized the decisions in the present case, *Dresser*, and *Christensen*, in which the requirement of a "clear right to relief . . . is allowed to slide into mere right to relief, on the theory that disqualification cases usually turn on the interpretation of ethical standards rather than disputed facts, and hence raise 'legal issues' on which appellate courts do not defer to trial courts . . . ." *Id.* at *8-*9. To "avoid the collapse of mandamus into appeal," the Seventh Circuit adopted a "patently erroneous" standard for litigants seeking mandamus to set aside attorney-disqualification orders. *Id.* at *9.

The present case demonstrates that the Seventh Circuit was rightly concerned with the ease with which mandamus can be collapsed into appeal in attorney-disqualification cases. As Judge Posner observed:

> If review by means of mandamus means the same thing as review by means of appeal, however, the Supreme Court in holding that an order of disqualification is not a collateral order immediately appealable under the final-decision rule of 28 U.S.C. § 1291 may have accomplished little or nothing except to rename "appeal" "mandamus."

Id. at *2. This Court's decisions will be reduced to exactly that if the decision of the Fifth Circuit in the present case is allowed to stand.

II
THE FIFTH CIRCUIT IMPROPERLY SUBSTITUTED ITS OWN FACT FINDINGS FOR THOSE OF THE DISTRICT COURT

American asserts that in reversing the district court the Fifth Circuit did no more than apply appropriate legal and ethical principles to undisputed facts. Brief in Opp. at 13-14. American's description of the Fifth Circuit's action is plainly wrong. Although American uses its brief in opposition to reargue the facts and to paint the worst possible picture of the conduct of Vinson & Elkins, American's lengthy recital of the facts proves what Northwest has already shown. The district court resolved critical factual disputes in favor of Northwest. Pet. App. B at B-2 to B-3. The Fifth Circuit recognized that there were contested questions of fact (Pet. App. A at A-7) but then improperly made its own extensive *de novo* fact findings repudiating those of the lower court. *See* Pet. at 17-19; Pet. App. B at B-2 to B-3.

The underlying facts governing the relationship between Vinson & Elkins's prior representation of American and its representation of Northwest were strongly contested. The evidence consisted of extensive affidavits and papers generated in the earlier representations. The sworn testimony sharply conflicted on virtually all factual issues material to the relationship between Vinson & Elkins's prior representation of American and its present representation of Northwest: the nature and extent of the services provided by Vinson & Elkins in three different matters, the confidentiality of the information imparted to Vinson & Elkins, and the similarity of the

issues in the relevant matters.[2]

The district court "carefully examined" the "voluminous pleadings" and resolved these fact disputes in favor of Northwest. The court expressly determined that the matters Vinson & Elkins handled for American "were only tangentially related to this litigation" and that any information actually received by Vinson & Elkins "was not sufficient to cause any material prejudice" to American. Pet. App. B at B-2 to B-3. The Fifth Circuit reviewed *de novo* the voluminous record, resolved these factual disputes in American's favor, and rejected the findings of the district court.

American's concession that the substantial-relationship determination is "fact bound," Brief in Opp. at 15, illustrates the fundamental flaw in American's position. Precisely because this determination is fact bound, the Fifth Circuit was required to give deference to the district court's findings. Northwest is not, as American suggests, asking this Court to review the Fifth Circuit's fact findings to see if they are correct. Rather, Northwest is asking this Court to grant certiorari and to reverse the Fifth Circuit precisely because that court improperly made *de novo* fact findings of its own.

In *Sandahl*, the Seventh Circuit recognized that mandamus may be appropriate when "without elaborate considerations of contested facts and legal principles," it is apparent that a district-court order on disqualification is "plainly wrong." *Id.* at *6-*7.

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[2] Compare the affidavits of Steinberg (R-6) with those of Smith, Stern and Murchison (R-10). The Smith, Stern and Murchison affidavits have been lodged under seal with the Clerk of this Court.

Here, as American's brief so clearly shows, the Fifth Circuit granted the writ only after an elaborate analysis of the facts and law resulting in substitution of its own fact findings for those of the district court.

III

THE FIFTH CIRCUIT REJECTED THE WIDELY ACCEPTED RULE THAT ATTORNEY DISQUALIFICATION IS WITHIN THE DISCRETION OF THE DISTRICT COURT

Northwest has shown in its petition that other circuits have consistently held that a ruling on attorney disqualification is committed to the discretion of the trial court and that the appropriate standard of review is abuse of discretion. Pet. at 16. In this case, the Fifth Circuit expressly disavowed the abuse-of-discretion standard it had applied in previous decisions. Pet. App. A at A-7; Pet. at 15-16.

American seeks to confuse the issue by arguing that abuse of discretion is not the standard applied by other circuits in attorney-disqualification cases even though those circuits state that it is the standard they use. Brief in Opp. at 14-15 and n.11.[3] American argues it has found no case in which a court determined that the substantial-relationship standard was violated but refused to disqualify counsel. Brief in Opp. at 14. American's argument is circular. Trial courts utilize their discretion in applying the substantial-relationship test. If the relationship is not substantial enough,

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[3] For instance, in *Gas-A-Tron v. Union Oil Co.*, 534 F.2d 1322 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976), the Ninth Circuit expressly recognized that attorney disqualification based on the substantial-relationship rule was within the sound discretion of the trial court. 534 F.2d at 1325.

disqualification is denied. Other circuit courts review the trial courts' exercise of discretion. They do not, as was done here, make *de novo* findings and reverse merely because they disagree with the trial court.

IV
THE FIFTH CIRCUIT ADOPTED A NEW AND UNWORKABLE "DUTY OF LOYALTY" STANDARD FOR ATTORNEY DISQUALIFICATION IN FORMER-CLIENT CONFLICT CASES

American's characterization of the substantial-relationship standard adopted by the Fifth Circuit in this case is also flawed. As Northwest's Petition makes clear, loyalty is relevant to the substantial-relationship test, but its relevance is based on the concern for protection of client confidences and the resulting breach of loyalty that would arise if such confidences were improperly revealed. A plain reading of the Fifth Circuit's opinion reveals that the panel's standard detaches the duty of loyalty from the concept of the protection of confidences. Pet. App. A at A-25 to A-32.[4] The Fifth

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[4] American makes much of the point that in applying the substantial-relationship test, courts will presume that confidences were revealed to the attorney by the former client. Brief in Opp. at 16-17. American's argument ignores the fact that in the district court American submitted in camera evidence which it claimed demonstrated that confidences had been revealed to Vinson & Elkins that would prejudice American in this litigation. The district court rejected American's argument. Under these circumstances, application of a presumption of shared confidences under the substantial relationship test "simply makes no logical sense". *United States Football League v. National Football League*, 605 F. Supp. 1448, 1462 (S.D.N.Y. 1985). As the court in *National Football League* explained, the "purpose of the assertedly irrebuttable presumption is to foreclose proof relating to confidences. Once the parties agree to permit such proof, the purpose the irrebuttability rule is supposed to serve is gone; hence the rule itself--assuming there is such a rule--should be gone as well for purposes of this

Circuit acknowledged that its standard could permit disqualification of an innocent client's freely chosen counsel even in cases in which continued involvement by counsel would pose no threat of tainting the proceedings. Pet. App. A at A-10 to A-11.

American even argues that there is no difference between the test applied by the Fifth Circuit and the "taint" test of the Second Circuit and other courts. Brief in Opp. at 17 n.13. The Fifth Circuit itself thinks otherwise. After describing the Second Circuit view that disqualification is proper only "where a court also finds that the unethical conduct threatens to taint the trial", the Fifth Circuit said that it had "struck a different balance" and "[w]e have squarely rejected this hands-off approach in which ethical rules `guide' whether counsel's presence will 'taint' a proceeding . . . ." Pet. App. A at A-10 to A-11.[5]

CONCLUSION

The Fifth Circuit's decision impermissibly expands mandamus jurisdiction and introduces a new and unworkable duty of loyalty in lieu of the established substantial-relationship standard. The decision patently conflicts with the mandamus standards established by this Court and with attorney-disqualification cases from other circuits. This Court should grant the writ to resolve these conflicts and to clarify these important issues.

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case." *Id.* (citation omitted).

[5] The standard for attorney disqualification in federal courts is a question of federal law. Under the Fifth Circuit's approach, the ethical standard that will apply in former-client conflict cases will depend on where the case is litigated. Such a result is unfair to both lawyers and their clients.

Respectfully submitted,

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